Supreme Court, U.S.
FILED

031173 FEB 16 2004

CASE NUMBER _____
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In the Supreme Court of the United States

October Term, 2003

DANNY MASON, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether all the information known by respondent Horan immediately prior to his attempted seizure of petitioner would give a reasonable agent under similar circumstances probable cause to physically attempt to detain the petitioner.

2. Whether respondent Horan's use of deadly force in his continuing attempt to seize the petitioner and compel him to answer respondent Horan's questions was reasonable, when respondent Horan knew that he did not have any reason to detain the petitioner.

3. Whether respondent Horan had a reasonable belief that the petitioner posed a threat of serious physical harm to the respondent or to others, when respondent Horan shot at the petitioner several times, eventually hitting the petitioner in the back as he was fleeing.

4. Whether respondent Horan was entitled to qualified immunity after he intentionally attempted to seize the petitioner by the use of deadly force despite his knowledge that he did not have a reasonable suspicion that the petitioner was involved in criminal activity.

5. Whether sufficient factual disputes existed that precluded summary judgment for respondent Horan on all petitioner's claims.

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ON PETITION FOR A WRIT OF
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PETITION FOR WRIT OF CERTIORARI

Vernon E. Peltz, on behalf of Danny Mason, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the United States District Court for the District of Arizona's granting summary judgment for respondent on all petitioner's claims.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is an unpublished memorandum decision and is contained in Appendix A, page 1a.

JURISDICTION

The District Court's Order granting summary judgment to the respondent was signed on the 15th day of March, 2002 and that order was filed on March 18, 2002. (Appendix B, page 4a).

The District Court had previously granted the respondent's motion for summary judgment as to the petitioner's claim for unlawful seizure in the order dated April 17, 2000, but that order was not a final appealable order. (Appendix C, page 18a). Later, the District Court granted the respondent's second motion to reconsider the denial of summary judgment as to the petitioner's claim of excessive force, and dismissed the state law claims on the 18th day of March, 2002. Petitioner had no other claims, and that order was a final order dismissing all petitioner's claims. The petitioner timely filed a notice of appeal on the 11th day of April, 2002.

The United States Court of Appeals for the Ninth Circuit heard the matter and affirmed the decision of the United States District Court in an unpublished memorandum decision on August 22, 2003. (Appendix A, Page 1a). The petitioner filed a Petition for Rehearing with the United States Court of Appeals for the Ninth Circuit on October 3, 2003. (Appendix D, page 27a). The United States Court of Appeals for the Ninth Circuit denied the Petition for

Rehearing on November 19, 2003. (Appendix E, page 39a).

There is no order granting an extension of time to file the this Petition for a Writ of Certiorari. This court has original jurisdiction of this matter pursuant to Article III, Section 2 of the United States Constitution. 28 U.S.C. §1254(1) is the statutory provision which provides jurisdiction for the Supreme Court of the United States to review the final judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner filed a 1983 action alleging unlawful arrest, excessive force and a state law claim of assault on January 1, 1999 against United States Agents Horan, Townsend and Sergeant Dannels from the Cochise County Sheriff's Department. The petitioner alleged that on the day in question respondent Horan attempted to seize and arrest the petitioner without probable cause in violation of the

Fourth Amendment to the United States Constitution, and that shooting the petitioner in the back as he was leaving was an unreasonable and excessive use of force.

All alleged defendants answered the complaint. Horan and Townsend filed a Motion to substitute the United States of America as the proper party for counts 3 & 4 (unlawful arrest and excessive force), which was granted by the Court. (Appendix F, page 40a).

Vernon E. Peltz filed his appearance and substitution of counsel on April 21, 1999. (Appendix G, page 41a). On October 25, 1999, the petitioner agreed to dismiss Dannels and Townsend and proceed only against respondent Horan since he was the only officer who shot at the petitioner. (Appendix H, page, 43a).

Depositions were taken and respondent Horan testified under oath at his deposition. Respondent Horan testified that he did not have probable cause to arrest the petitioner when he arrived at the trailer on the day in question. Respondent Horan also admitted that he did not have even a reasonable suspicion of criminal activity sufficient to detain the petitioner based upon all the information that he knew prior to meeting the petitioner at the trailer on the day in question. (Appendix I, page 44a)

On November 15, 1999 respondent Horan filed a motion for summary judgment and a statement of facts supporting that motion. (Appendix J, page 47a). The petitioner filed a response to the respondent's motion for summary judgment and a statement of controverted facts in support of opposition to the motion for summary judgment on December 15, 1999

(Appendix K, page 76a) and respondent replied on January 3, 2000. (Appendix L, page 106a).

The petitioner plead guilty to assaulting a federal officer. (Appendix T, page 154a) After the petitioner was sentenced, petitioner filed a motion requesting the District Court to recuse itself on December 22, 1999, (Appendix M, page 121a) and the Court denied the motion on January 10, 2000. (Appendix N, page 126a). The petitioner filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit in cause number 00-70105 on or about January 27, 2000. The petitioner was seeking to have the District Court Judge removed based on the Judge's statements during petitioner's sentencing which demonstrated that the Judge was biased. The United States Court of Appeals for the Ninth Circuit denied the petitioner's Petition for Writ of Mandamus.

On April 17, 2000, the District Court granted the summary judgment to respondent as to the unlawful arrest claim but denied summary judgment as to the excessive force claims on the grounds that there were disputed issues of fact to be resolved. (Appendix C, page 18a). On May 1, 2000 the respondent filed a motion to reconsider the District Court's order denying the respondent's motion for summary judgment on the excessive force claim. (Appendix O, page 131a). On May 10, 2000 the petitioner filed a Response to the respondent's motion to reconsider, (Appendix P. page 140a) and on May 22 the respondent filed a motion to reply to petitioner's response to the motion for reconsideration. (Appendix Q, page 144a).

The respondent's motion to reply informed the

Court that Rule 1.10(p) of the Rules of Practice of the United States District Court for the District of Arizona did not permit a response to be filed unless ordered by the Court. Therefore, the petitioner was not to file a response unless the Court was inclined to grant the motion to reconsider and requested a response from petitioner. On May 31, 2000 the District Court granted the respondent's motion to file a reply to petitioner's response to the motion to reconsider.

On July 14, 2000, after the respondent had filed its reply, the District Court denied the respondent's motion to reconsider. (Appendix R, page 146a). The Court denied the motion to reconsider because the "Plaintiff submitted evidence which raised a genuine issue of material fact as to whether Plaintiff was shot after he had left the residence and no longer posed a threat to the officers." (Appendix R, page 149a). Almost a year later, on July 12, 2001, respondent Horan filed a second motion for reconsideration in light of new Supreme Court precedent. (Appendix S, page 150a). Without ordering a response from the petitioner as Rule 1.10(p) of the Rules of Practice of the United States District Court for the District of Arizona required, the Court signed the order granting the respondent's motion for reconsideration of the denial of summary judgment which was filed on March 18, 2002. (Appendix B, page 4a). The District Court dismissed all the petitioner's remaining pendent state claims in the same order.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. The United States Court of Appeals for the Ninth Circuit held that the "standard for the use of

deadly force against fleeing suspects was articulated by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1(1985)." (Appendix A page 2a). The United States Court of Appeals for the Ninth Circuit reasoned that since it was,

> undisputed that appellant committed a crime involving the threatened infliction of serious physical harm. It was also undisputed that the shot that injured appellant was fired as he was fleeing the scene of the assault. *Garner* supports the conclusion that a reasonable officer in Horan's position could have determined that the use of deadly force to prevent escape under such circumstances was constitutionally acceptable.

(Appendix A page 3a).

The petitioner filed a petition for rehearing because the Court of Appeals had completely ignored the petitioner's argument that agent Horan's very first attempt to seize the petitioner was not justified. The petitioner also pointed out that the petitioner was not a fleeing suspect when he turned to leave without answering respondent Horan's questions. The petitioner's petition for rehearing was denied by the Court of Appeals.

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

The petitioner filed a complaint in federal court alleging that his constitutional rights were violated. The petitioner filed a 1983 action alleging unlawful

arrest and excessive force. The petitioner alleged that on the day in question respondent Horan attempted to seize the petitioner without probable cause in violation of the Fourth Amendment to the United States Constitution, and that shooting the petitioner in the back as he was leaving was an unreasonable and excessive use of force. The petitioner has consistently maintained that his Fourth Amendment rights have been violated at every stage of these proceedings since that complaint was filed.

STATEMENT OF FACTS

The respondent filed a motion for summary judgment and a statement of facts in support of that motion. (Appendix J, page 47a). The petitioner filed a opposition to motion for summary judgment and a statement of controverted facts in support of opposition to summary judgment. (Appendix K, page 76a).

Because respondent was granted summary judgment this Court "must assess the record under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure." *Lujan v. National Wildlife Federation*, 497 U.S. 871, at 883-884, 110 S.Ct. 3177, at 3186 (U.S.Dist.Col.,1990). Also *Graham v, Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) recognized that the Fourth Amendment reasonableness test is not capable of precise definition and that a proper application requires careful attention to the facts and circumstances of each case. Therefore, the facts as established by the parties' statement of facts are critical to the de novo review of this Court. In this case, what respondent

knew before he attempted to detain the petitioner, and what happened after that can be found in Appendix J and K. There were factual disputes between respondent's version of events and the petitioner's version of events, and the facts in this case should be considered in the light most favorable to the petitioner. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2152 (2001). Therefore the following facts were taken from both the respondent's version of events and petitioner's version of events found in his affidavit.

On February 13th, 1998, petitioner went to 711 N. Central Avenue in Sierra Vista, where Adam Gonzales lived, to get some of his tools that he had lent to Adam. Earlier that day, Kris Barnard, Adams' girlfriend, also an occupant of the trailer, had given respondent Horan, agent Townsend and Sergeant Dannels consent to search the trailer. After finding drugs and paraphernalia during the search, the officers sat down at the dining room table to debrief Barnard. During the conversation the officers were told that petitioner had recently attempted to mediate a dispute between Adam Gonzales and other narcotics traffickers in the Sierra Vista area. While the officers were talking with Barnard, the petitioner drove up. (Appendix J, page 48a)

Petitioner got out of his truck, leaving the truck door open, went up and knocked on the door. Kriss Barnard answered the door. Petitioner asked if Adam was home and Kriss Barnard said, "No." Petitioner had just taken one step into the trailer at that time. Then, Sgt. Dannels stepped into the hallway entrance at the other end of the hall and stated he would like to talk to petitioner. Petitioner never saw Horan or Townsend in the trailer (Appendix K, Exhibit 7,

Nos.3,4 and 5, page 101a).

Petitioner told Sgt. Dannels that he did not want to talk to him and he immediately turned to leave. The petitioner promptly turned around, exited the trailer and started to walk toward his truck. Petitioner was approximately one step away from the truck when somebody grabbed him by his left shoulder from behind, and petitioner pushed the hand away. Prior to that moment, there was never any conversation between respondent Horan and petitioner. Petitioner then jumped into the truck and closed the door. At that time respondent Horan reached into his truck and tried to get the keys. Petitioner pushed the individual's hand out of the truck, and then started to back up to leave. (Appendix K, Exhibit 7, Nos. 6, 7, 8 and 9, page 102a)

Petitioner thought he was going to clip the teal colored sedan parked behind Kriss Barnard's car, so he stopped and then pulled forward to put his vehicle into a position to back out without hitting anything. (Appendix K, Exhibit 7, No. 11, page 102a)

After petitioner was near or past the gate heading for the field in reverse he heard the first shots that were fired at him. The petitioner could scarcely believe that the officers were trying to kill him for not answering questions. He was terrified that he was going to die. At that time respondent Horan was still standing inside the fenced area. (Appendix K, Exhibit 7, Nos. 13, 14 and 15, page 102a -103a)

As petitioner was frantically trying to avoid being shot while backing out of the fenced area, he never saw Sgt. Dannels anywhere behind his vehicle. The first time petitioner saw Sgt. Dannels was in the trailer hallway and the second time he was lying on

the ground covering his head as if being shot at. (Appendix K, Exhibit 7, No. 14, page 102-103)

When respondent Horan began shooting at petitioner he panicked, he had no idea why these officers would try to kill him. He desperately wanted to escape without being shot, so he put his truck in forward gear and proceeded to leave the area. Then respondent Horan fired five more times as petitioner was driving away. The last shot went through the rear window and hit petitioner in the back. He was in severe pain and bleeding profusely. His only thought was to get somewhere where there were witnesses so that when he stopped and surrendered to Sgt. Dannels, he would not be shot and killed. (Appendix K, Exhibit it 7, Nos. 15 and 16, page 103a)

When the officers arrived where petitioner had stopped, petitioner was out of the truck and walking toward the officers saying, "I surrender." They had their guns pointed at him and were yelling at him to get on the ground. Petitioner was never told he was under arrest until that time. (Appendix K, Exhibit 7, No. 17, page 103)

REASONS FOR GRANTING REVIEW

The Court of Appeals for the Ninth Circuit has decided the federal question in this case in a way that conflicts with several decisions of this Court.

The Court of Appeals for the Ninth Circuit affirmed the District Court's decision that the undisputed facts establish as a matter of law that respondent Horan was entitled to qualified immunity. Considering the facts of this case, the decision of the

Court of Appeals for the Ninth Circuit is in sharp conflict with holdings of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968); *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985); *Graham v, Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989); and *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2152 (2001).

The primary reason that the Court of Appeals decision conflicts with *Terry v. Ohio* is because even if Respondent Horan did not violate the Fourth Amendment by merely requesting that petitioner talk to him when petitioner approached the trailer on the day in question; the holding of *Terry v. Ohio* would indicate that the petitioner need not answer any questions put to him and the petitioner could decline to listen to questions at all and could go on his way. *Terry v. Ohio*, 392 U.S. at 32-33, 88 S.Ct. at 1885-1886 (1968); see also *Florida v. Royer*, 460 U.S. 491 at 497-498, 103 S.Ct. 1319, at 1324 (1983).

The decision of the Court of Appeals conflicts with the decision of *Tennessee v. Garner* because the Court of Appeals failed to recognize that even if Respondent Horan had probable cause to seize the petitioner, "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, at 9, 105 S.Ct. 1694, at 1700 (U.S.Tenn.,1985). Also, unlike *Garner* this petitioner was not even a suspect. Even Justices O'Connor and Rehnquist, the dissent in *Garner*, would not sanction the use of deadly force to make a citizen answer respondent Horan's questions.

The decision of the Court of Appeals conflicts

with the decision of *Graham v. Connor* because the Court of Appeals and the District Court both fail to recognize that when, "the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures.'" *Graham v. Connor*, 490 U.S. 386, at 394, 109 S.Ct. 1865, at 1871 (U.S.,1989). The decision of the Court of Appeals completely fails to carefully balance the nature and quality of the intrusion on the petitioner's Fourth Amendment interest against the countervailing governmental interest at stake. The Court of Appeals begins its analysis by failing to recognize that the petitioner was a free citizen, and that the respondent did not have a reasonable suspicion of criminal activity when he attempted to seize the petitioner by the use of deadly force.

Finally, the decision of the Court of Appeals conflicts with this Court's opinion in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001) because the District Court had previously decided that there were genuine issues of fact that precluded summary judgment for the respondent, and the holding in *Saucier* could not change that. Even more importantly, *Saucier* held that the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, at 202, 121 S.Ct. 2151, at 2156 (U.S.,2001). Applied to the facts of this case, it should have been clear to respondent Horan that he

could not force the petitioner to answer his questions because respondent Horan knew that he did not have a reasonable suspicion to justify any detention, much less his use of deadly force.

The District Court erroneously determined respondent Horan had probable cause to detain the petitioner, and even if respondent Horan had a reasonable suspicion, the petitioner should have been free to leave without answering any questions.

Respondent Horan filed a motion for summary judgment arguing that Respondent Horan had justification to stop and frisk Mason pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). In that motion the respondent sets forth all the information that respondent knew prior to meeting the petitioner on the day in question. The District Court granted the respondent's motion as to the petitioner's false arrest claim finding that in "this case, Agent Horan possessed a sufficient basis to briefly detain and "pat down" Plaintiff pursuant to *Terry v. Ohio.*" (Appendix C. page 23a). The Court of Appeals decision makes that error worse by considering the petitioner a suspect. Considering all that respondent Horan knew before he attempted to seize the petitioner, he did not have a reasonable suspicion to detain petitioner.

Respondent Horan did not have a warrant, and the reasonableness of his warrantless seizure of petitioner must be measured upon the same standard as that of a magistrate when issuing an arrest warrant. *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 506, 91 S.Ct. 1031, 28 L.Ed.2d

306 (1971); *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 648 (1965); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). In *Whiteley* this Court expressly rejected the State's assertion that the reviewing court should employ a less stringent standard when reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest. *Whiteley*, 401 U.S. at 566, 91 S.Ct. at 1035-6. This is because less stringent standards for reviewing the officer's discretion to seize an individual would discourage officers from obtaining a warrant. Therefore, this Court must independently review the District Court's determination that respondent Horan had probable cause to seize the petitioner by objectively reviewing the facts of this case.

Since the District Court granted respondent Horan's motion for summary judgment on the Fourth Amendment claim, the facts which indicate exactly what respondent Horan knew were part of the respondent's motion for summary judgment. Those facts can be found in Appendix, J page 47a.

First, the facts should be viewed in a light most favorable to the non-moving party; the petitioner. If the facts are viewed in this light, there certainly were disputed issues of fact that should have precluded summary judgment. However, even if all the respondent's facts were undisputed they would not give a reasonable officer in respondent Horan's position reasonable suspicion, much less probable cause.

The key to what Respondent Horan knew when he attempted to detain Mr. Mason is nicely set forth in the respondent's statement of facts, number 29.

(Appendix J, page 69a). In that paragraph the respondent asserts that;

> Based on Mason's history, associates, and belligerent manner, Agent Horan was concerned that Mason might be under the influence of methamphetamine and that Mason didn't plan on leaving, but instead, was going to the truck to retrieve a gun so Agent Horan followed Mason out of the trailer. Agent Horan was aware that individuals under the influence of methamphetamine often act erratic, [sic] irrational [sic] and aggressive [sic].

Appendix J, page 69a.

Respondent Horan's concern that Mason might be under the influence of methamphetamine was merely a guess, and was not supported by any specific facts. The idea that Mason didn't plan on leaving was certainly not supported by the facts. It was very obvious that Mr. Mason did want to leave.

In the District Court's order the Court articulated the specific facts which it believed gave respondent Horan the basis to detain the petitioner. (Appendix C, page 23a-25a). The fact that respondent Horan "observed Plaintiff arrive at a residence in which they had recently discovered methamphetamine and a handgun" (Appendix C, page 23a) would not provide any suspicion that the person arriving was committing or about to commit a crime. The person arriving would not know what was in the house prior to entering the house.

The fact that "Agent Horan was aware that Plaintiff was an associate of known methamphetamine

dealer and had previously been convicted for possession," (Appendix C, page 23a)does not create any suspicion that a crime is being committed or about to be committed. The petitioner in this case was convicted of possession of marijuana, not methamphetamine, and that conviction was years prior to the time that petitioner was shot in back while attempting to leave the trailer that day.

The fact that petitioner was an "associate of a known methamphetamine dealer" (Appendix C, page 23a) does not create any reasonable suspicion that petitioner was about to commit a crime. The fact that "Agent Horan also had information that Plaintiff was personally involved in dealing illegal substances," (Appendix C, page 23a) does not create any suspicion that he was dealing on the day in question. In fact, the information that respondent Horan possessed was that a confidential informant had told respondent Horan that Mason was "turning over his drug sales to somebody else until things cooled off." (Appendix C, footnote 4, page 23a). That statement would only lead a reasonable individual to believe that petitioner was not selling drugs at the time in question.

The fact that "Agent Horan knew that Plaintiff had previously been convicted of a firearms offense and that a handgun was reported to be at his residence," (Appendix C, footnote 5, page 23a) is certainly not any indication that petitioner possessed a weapon that day. This is true partly because the mention of a gun was at petitioner's house not at Ms. Barnard's house, and partly because the actual report was that petitioner's daughter Melissa had displayed the gun not petitioner. (Appendix C, footnote 5, page 23a).

Finally, the fact that "Plaintiff had a history of confrontation with law enforcement and had recently been released from state prison," (Appendix C, page 23a) is no indication that the petitioner was looking for trouble on that day. Even if the petitioner was looking for trouble, that is not a crime, and the respondent cannot detain an individual because he might start trouble. The respondent would have to wait until the individual actually started some trouble, and the trouble that was started must be criminal.

The District Court also believed that the petitioner's behavior when he decided that he was not going to answer any questions supported a finding of reasonable suspicion. "He abruptly attempted to leave the residence as soon as Sgt. Dannels stepped forward and asked to talk to him. Plaintiff concedes that he had no desire to talk to law enforcement, and was attempting to leave the residence quickly to avoid being questioned." (Appendix C, page 24a). However, the petitioner "may not be detained, even momentarily, without reasonable objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491 at 498, citing *U.S. v. Mendenhall*, 446 U.S. 544, at 556 (1980). Therefore it was clear error for the District Court to rely upon the petitioner's behavior when he decided that he was not going to answer any questions to support a finding of reasonable suspicion.

Even if respondent did have a reasonable suspicion for a brief detention of petitioner, the petitioner made it perfectly clear to all the officers present that day that he did not want to speak to the

officers. After respondent Horan told petitioner that he wanted to speak with him, it should have been very obvious to respondent Horan that petitioner did not want to speak to the respondent and respondent Horan should have simply allowed him to leave. Respondent Horan certainly should not have followed Mr. Mason out the door. There is no question that respondent Horan should never have placed his left hand against petitioner's back. Respondent Horan should not have attempted to guide petitioner to the side of the truck. Respondent Horan had no lawful right to attempt to frisk Mr. Mason for respondent Horan's protection. Respondent Horan did not have probable cause to tell petitioner that he was under arrest and he should not have struggled to obtain petitioner's keys. Since the respondent did not have even a reasonable suspicion of criminal activity, he should have let the petitioner go on his way once he knew that the petitioner did not want to answer respondent's questions

Respondent Horan was completely out of line when he pulled out his weapon, fired nine times at petitioner hitting him the back with his last shot as Mr. Mason was fleeing for his life. Considering the totality of all that respondent knew on the day in question, the respondent did not have a reasonable suspicion of criminal activity. The petitioner was a free citizen, and when he said that he did not want to speak to the officers he should have been permitted to leave.

The Court of Appeals decision does not address the petitioner's claim that the District Court should not have granted summary judgment to the respondent on petitioner's false arrest claim. The

decision of the Court of Appeals makes that error worse by considering the petitioner a suspect rather than a free citizen. The *Garner* opinion considered whether police may use deadly force to prevent the escape of a fleeing felon, not a free citizen who should have been permitted to walk away without answering any of respondent's questions. The Court of Appeals incorrectly considered the petitioner to be a suspect rather than a free citizen, and that is a critical error that effects the entire decision.

The decision of the Court of Appeals fails to balance the nature and intrusion of the petitioner's Fourth Amendment interest against the countervailing governmental interest at stake.

In *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871 (U.S.,1989) this Court held "that *all* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, at 395, 109 S.Ct. 1865, at 1871 (U.S.,1989). The *Graham* Court also held that determining whether the amount of force used to effect a particular seizure is reasonable "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, at 396, 109 S.Ct. 1865, at 1871 (U.S.,1989). The *Graham* Court also recognized that the reasonableness test is not capable of precise

definition and that a proper application requires careful attention to the facts and circumstances of each case. Factors to be considered are, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, at 396, 109 S.Ct. 1865, at 1872 (U.S.,1989).

In order to carefully balance the nature and quality of the intrusion on the petitioner's Fourth Amendment interests against the countervailing governmental interests at stake, it is critical to accurately assess the governmental interest at stake. The governmental interest at stake must be very significant because the 'intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, at 9, 105 S.Ct. 1694, at 1700 (U.S.Tenn.,1985).

In the instant case, the respondent did not have probable cause to seize the petitioner. Respondent was attempting to detain the petitioner to force him to answer his questions. The petitioner was not actively resisting arrest since the respondent did not have probable cause to arrest. For the same reason the petitioner was not attempting to evade arrest by flight. Respondent Horan admitted that he had no reason to detain petitioner let alone arrest him, nor did respondent Horan indicate to petitioner that he was under arrest until after petitioner was shot in the back.

The petitioner was not attempting to injure any officer, he was only trying to save himself from being

shot. Once the respondent began firing at the petitioner he panicked and all he could think about was saving his life. And absent respondent Horan's efforts to keep him from leaving, which he admitted he did not have probable cause to do, the entire incident would never have taken place. It is only by avoiding the issue of whether respondent Horan had probable cause that the Court of Appeals can conclude that petitioner was a fleeing suspect. One of the factual issues that was in dispute was when respondent began firing at the petitioner, therefore respondent Horan could have begun shooting at petitioner before he endangered Dannels.

The Court of Appeals held the petitioner committed a crime involving the threatened infliction of serious physical harm, relying upon the fact that petitioner had plead to assaulting an officer. The factual basis of the petitioner's plea can be found in Appenix T, page154a. The petitioner admitted to the following factual basis;

> On February 13, 1998, in Sierra Vista, Arizona, I was approached by three law enforcement officers. They attempted to detain me in order to conduct an interview. I refused to allow myself to be interviewed and attempted to leave the area in my vehicle. DEA agent David Horan attempted to physically prevent me from getting in my vehicle. In response, I knocked him backward with my left forearm. I then got into my vehicle and attempted to leave. Agent Horan reached inside my truck in an effort to turn off the engine. I

> struggled with the agent attempting to push him out of the truck. I then drove the truck in reverse at a high rate of speed directly toward another law enforcement officer (Sgt. Mark Dannels). I did not see the officer, but I concede that my conduct was reckless. In order to avoid being hit by my vehicle, Officer Dannels was forced to dive out of he way, landing in a cactus. At the time of this event, Sgt. Dannels was assisting federal law enforcement officers in the performance of their official duties.

Appendix T, page 158a-159a.

First, it must be remembered that if the respondent had permitted the petitioner to leave when petitioner made it perfectly clear that he did not want to answer any questions, no crime would ever have occurred. The respondent wants to justify his use of deadly force because the petitioner was reckless in his attempt to keep from being shot. How close Dannels was to the truck, and whether there was any real threat of serious physical injury was disputed by the parties.

Secondly, the facts do not indicate that the petitioner committed a crime involving the threatened infliction of serious physical harm. Considering the factual basis of the plea petitioner entered, the respondent was pushed, and that was not a serious injury. The petitioner did not see Dannels, but he admits he was reckless as he was fleeing for his life. Being shot at is very likely to cause any person to be reckless in their attempts to escape.

Respondent Horan is not entitled to qualified immunity because he knew that he had no reason to attempt to detain petitioner much less use deadly force in his attempt to force the petitioner to answer his questions.

The District Court's conclusion that *Saucier v. Katz, 533 U. S. 194,* 121 S. Ct. 2151 (2001) is "an intervening change in the controlling law," is completely incorrect. The holding of *Saucier* was that the qualified immunity inquiry is not the same as the constitutional inquiry. The holding in *Saucier* simply could not be relied upon by the District Court to reverse his opinion that a genuine issue of fact existed that precluded summary judgment. The District Court relies upon *Saucier,* otherwise there would be no reason to reverse his previous two decisions. The District Court denied Respondent's motion for summary judgment, and the previous motion to reconsider the denial of summary judgment filed by the Respondent because "[P]laintiff submitted evidence which raised a genuine issue of material fact as to whether Plaintiff was shot after he had left the residence and no longer posed a threat to the officers." (Appendix R, page 149a). There is nothing in the *Saucier* case that allows a court to grant summary judgment when there is a genuine issue of material fact to be resolved at trial, nor have the facts of this case changed since the Court partially denied the summary judgment. If disputed issues of fact existed, as the Court stated in his order denying the respondent's motion to reconsider, that did not change. This is true, because the facts of this case simply have not changed since the District Court's

previous orders.

Not only was the holding in *Saucier* a very narrow legal issue, the *Saucier* case turns on far different facts than the instant case. In *Saucier* Mr. Katz was a protester present during Vice President Gore's speech, and at some point Saucier felt Katz was a potential threat to the Vice President. At that point, he grabbed Katz from behind and rushed him out of the area, shoving him into a military van. Katz suffered no injuries as a result of that incident. Mr. Mason however, was shot in the back and punched in the face without any justification.

The first inquiry to be decided when considering whether the respondent is entitled to qualified immunity is, "[T]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, at 201, 121 S.Ct. 2151, at 2156 (U.S.,2001). Neither the District Court nor the Court of Appeals ever considered the facts in the light most favorable to the petitioner. If the facts are considered in a light most favorable to the petitioner, the question becomes; did respondent's use of deadly force to compel the petitioner to answer his questions when the respondent knew that he did not have a reasonable suspicion of criminal activity violate the petitioner's right to be free from unreasonable seizures?

The next inquiry is whether that right was clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, at 202,

121 S.Ct. 2151, at 2156 (U.S.,2001). It should be clear to all officers that they may not detain an individual without reasonable suspicion. Respondent knew that he did not have a reasonable suspicion sufficient to detain the petitioner. *Terry v. Ohio*, stands for the proposition that an officer may ask questions of any individual, but absent reasonable suspicion the individual must be free to ignore the officer.

The respondent is not entitled to qualified immunity because it would be clear to a reasonable officer that he could not lawfully detain petitioner when he knew that he did not have probable cause. The respondent is not entitled to qualified immunity because it also would be clear to a reasonable officer that the use of deadly force to compel the petitioner to answer his questions was unlawful in the situation he confronted. In other words, no reasonable officer would think that he could use deadly force to compel the petitioner to answer his questions when he knew that he did not even have a reasonable suspicion to detain the petitioner.

There were genuine issues of fact that precluded summary judgment.

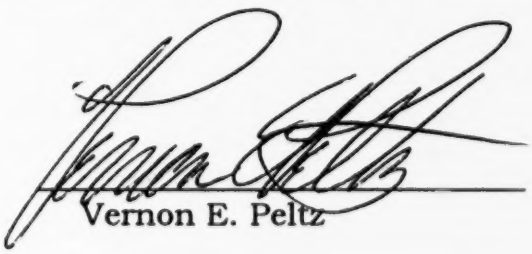
"In ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied." *Lujan v. National Wildlife Federation*, 497 U.S. 871, at 888, 110 S.Ct. 3177, at 3188 (U.S.Dist.Col.,1990). The respondent filed a

motion for summary judgment and a statement of facts in support of that motion. (Appendix J). The petitioner filed a opposition to motion for summary judgment and a statement of controverted facts in support of opposition to summary judgment. (Appendix K). There can be no question that facts specifically averred by petitioner contradicted facts specifically averred by the respondent, therefore the respondent's motion was properly denied by the District Court. Since the holding in *Saucier* did not effect any disputed facts the District Court committed error by granting the respondent's second motion to reconsider based upon *Saucier*. Because there remained genuine issues of fact that are disputed, the grant of summary judgment to respondent was error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 13th day of February, 2004.



Vernon E. Peltz

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY MASON, Plaintiff-Appellant,	) No. 02-15837
v.	) D.C. No.
DAVID HORAN, et al., Defendants-Appellees.	) CV-99-15-TUC-JMR
	) MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted May 13, 2003
San Francisco, California

Before: HAWKINS and FLETCHER, W., Circuit Judges, and BREYER, District Judge.**

Appellant brought an excessive-force claim against appellee David Horan, an agent with the Drug Enforcement Administration. After initially denying Horan's motion for summary judgment based on qualified immunity, the district court reconsidered its ruling in light of the Supreme Court's intervening decision in *Saucier v. Katz*, 533 U.S. 194 (2001). This appeal followed. The issue before this Court is whether the district court correctly found that the undisputed facts established as a matter of law that Horan was entitled to qualified immunity. We have

jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Even when a reasonable juror could find "on a favorable view of the parties' submissions" that a police officer used excessive force, the officer is entitled to qualified immunity unless there was "a clearly established rule prohibiting [him] from acting as he did." *Id.* at 209. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Officer Horan shot and injured appellant as appellant was fleeing from Horan and two other law enforcement officers in his truck. Moments earlier, appellant had driven the truck in reverse straight toward one of the officers, causing him to dive out of the way and into a cactus. As a result of that conduct, appellant was charged with, and pled guilty to, assault on a peace officer.

The standard for the use of deadly force against fleeing suspects was articulated by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). While noting that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable," the Court held that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11. Thus, said the Court, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly

force may be used if necessary to prevent escape" and if warning has been given. *Id.* at 11- 12.

Here, it was undisputed that appellant committed a crime involving the threatened infliction of serious physical harm. It was also undisputed that the shot that injured appellant was fired as he was fleeing the scene of the assault. *Garner* supports the conclusion that a reasonable officer in Horan's position could have determined that the use of deadly force to prevent escape under such circumstances was constitutionally acceptable. Officer Horan was therefore entitled to qualified immunity, and summary judgment in Horan's favor was appropriate.

AFFIRMED.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Danny Mason,	)	
Plaintiff,	)	No. CV 99-15 TUC JMR
v.	)	
United States, et al.,	)	ORDER
Defendants.	)	
	)	

Pending before the Court is Defendant DEA Agent David Horan's "Motion for Reconsideration in Light of New Supreme Court Precedent" and "Motion to Stay the Proceeding" pursuant to 50 App. U.S.C. § 521 of the War and National Defense Soldiers and Sailors Civil Relief Act of 1940.[1] Plaintiff has not filed an objection to the stay. However, because Defendant Horan's motion for reconsideration is granted, and the remaining claim against him dismissed, there is no need to stay this case. Moreover, in light of the Court's ruling that Defendant Horan is entitled to qualified immunity, Plaintiff's state tort claim for assault is also dismissed. Having no further issues to resolve, this case is dismissed.

DISCUSSION

Defendant Horan's pending motion for

[1]Defendant Horan seeks a stay of these proceedings because on December 8, 2001, he was called back into active duty with the Department of Air Force. Defendant Horan is now stationed in Al Jaber, Kuwait, and indicates that his ability to defend this case is materially affected by his military service.

reconsideration is made "in light of new Supreme Court Precedent" pursuant to Rule 59 (e) and Rule 60 (b) of the Federal Rules of Civil Procedure. Plaintiff failed to file any response to the motion for reconsideration. At issue in the motion for reconsideration is whether Defendant Horan should be granted qualified immunity as to Plaintiff's claim that Defendant Horan used excessive force against him.[2]

1. Motion to Reconsider in Light of New Supreme Court Precedent

Defendant Horan argues that there has been "an intervening change in the controlling law" since this Court denied his motion for summary judgment on Plaintiff's excessive force claim and refers the Court to a recent Supreme Court decision, *Saucier v. Katz*, 121 S.Ct. 2151 (2001). In *Saucier*, the Supreme Court reversed a Ninth Circuit ruling in which the Ninth Circuit had denied a military police officer's motion for summary judgment based on qualified immunity because an issue of material fact remained. *Id.* at 2154. The Ninth Circuit had concluded that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Saucier v. Katz*, 194 F. 3d 962, 968 (911 Cir. 1999), *rev'd* 121 S.Ct. 2151 (2001). The Supreme Court granted *certiorari* in order to address whether "the

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[2]The factual and procedural history of this case is not recounted, expect for those facts necessary to explain this decision, because the two previous orders on Defendant Horan's motion for summary judgment provide thorough reviews of that history and because the Parties are familiar with these facts.

requisite analysis to determine qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact." *Saucier*, 121 S.Ct. at 2154. Concerned that the approach adopted by Ninth Circuit might undermine the goal of qualified immunity, the Supreme Court held that a "ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." *Id.*

The Supreme Court provided a two-step inquiry for courts ruling upon qualified immunity issues. The court's initial inquiry should be whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 2156. If no constitutional right was violated, then there is no necessity for any further inquiry concerning qualified immunity. *Id.* However, if a constitutional right violation was shown, then "the next sequential step is to ask whether the right was clearly established." Id. The Supreme Court emphasized that "[t]his inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition..." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 2156-57 (citation omitted).

In light of *Saucier*, a review of this Court's ruling of Defendant Horan's motion for summary judgment based on qualified immunity is warranted as it appears that there has been an intervening change in the controlling law.[3] Therefore, as a threshold matter, this Court must determine whether Plaintiff has demonstrated the deprivation of a constitutional right. See *Saucier*, 121 S.Ct. at 2156. If a deprivation is found, then this Court must determine whether the law put Defendant Horan on clear notice that his conduct violated Plaintiff's constitutional rights. *Id.* Because this analysis is performed at the summary judgment stage, the evidence must be viewed in the light most favorable to Plaintiff. *Id.*

A. Constitutional Right Violated - Use of Deadly Force

Under the Fourth Amendment, officers may only use a degree of force that is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citation omitted).[4] Use of deadly force is reasonable when a suspect poses an immediate threat to the safety of officers or others. *Id.*

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[3]As recently as February 4, 2002, the Ninth Circuit recognized that the Supreme Court's ruling in *Saucier* constituted a change in the approach used by this circuit when addressing issues of qualified immunity. *See Robinson v. Solano County*, 278 F.3d 1007, 2011 (9th Cir. 2002) .

[4]While the test for reasonableness is often a question for the jury, this issue may be decided as a matter of law if, despite resolving all factual disputes in favor of the plaintiff, the officer's force was "objectively reasonable" under the circumstances. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994).

at 396 (citation omitted). The use of deadly force is also reasonable when it is used to prevent the escape of a fleeing felony suspect but only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3(1985). However, "[t]he suspect need not be armed or pose an immediate threat to the officers or others at the time of the shooting." *Forrett v. Richardson*, 112 F.3d 416, 420, (9th Cir. 1997), overruled on other grounds by *Chroma Lighting v. GTE Products Corp.*, 127 F.3d 1136 (9th Cir.1997). Rather, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* (citing *Garner*, 471 U.S. at 11-12 (emphasis omitted)). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 387. The calculus of reasonableness "must embody an allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation." *Id.* Therefore, when assessing whether an officer's use of deadly force was reasonable, the Court should take the totality of the circumstances into consideration, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight..." *Id.* (citation omitted).

Analysis

In this case, Plaintiff maintains that Defendant Horan used excessive force when Defendant Horan shot him as he was trying to leave the residential lot and after he posed no further threat to the officers. In the April 2000 Court order denying Defendant Horan's motion for summary judgment, the Court concluded that the initial shots fired by Defendant Horan were justified but found "a genuine issue of material fact as to whether a reasonable officer would have believed that Plaintiff continued to pose a threat to Sgt. Dannels at the time he was shot."[5] Therefore, the specific issue at this stage is to determine whether Defendant Horan violated Plaintiff's Fourth Amendment rights when Defendant Horan shot Plaintiff as Plaintiff was attempting to leave the residential lot. After considering Defendant Horan's conduct under the preceding case law, however, it does not appear that Plaintiff has demonstrated a deprivation of his Fourth Amendment right to be free from unjustified deadly force.[6] Plaintiff concedes that,

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[5]After his motion for summary judgment was denied, Defendant Horan filed his first motion for reconsideration in May of 2000. The motion was denied, however, because the Court concluded that "Plaintiff [had] submitted evidence which raised a genuine issue of material fact as to whether Plaintiff was shot after he had left the residence and no longer posed a threat to the officers."

[6]As directed by the Supreme Court in *Saucier*, this Court has undertaken, as its first step, an evaluation of whether Plaintiff's allegations sufficiently allege a constitutional violation. Upon doing so, it has become clear that no...(continued)

at the time of the incident, he pushed Defendant Horan, who was acting in his official capacity as a law enforcement officer at the time, and that Defendant Horan was attempting to prevent Plaintiff from leaving an enclosed residential parking lot. Once Plaintiff pushed Defendant Horan, sufficient grounds for arrest were present, and Plaintiff's subsequent conduct constituted an attempt to flee from arrest.

Moreover, although Plaintiff denies that he attempted to run over Officer Dannels, he admitted in his plea agreement that he was driving "recklessly."[7] Defendant Horan, as well as the other officers present, observed Plaintiff race his engine, look into his rear view mirror, and drive in reverse at a high rate of speed directly towards Officer Dannels. Plaintiff's actions, whether intentional or reckless, caused officer Dannels to fear for his life. In fact, in order to avoid being struck by Plaintiff's truck, Officer

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constitutional violation has occurred. As such, any previous Court order that is inconsistent with this analysis is vacated as to this issue.

[7]Plaintiff pled guilty to Assault of a Federal Officer on April 23, 1999. In the plea agreement, Plaintiff conceded that on February 13, 1998, he knocked Defendant Horan backward with his left forearm as Defendant Horan attempted to prevent Plaintiff from leaving. Plaintiff conceded that once he got into his truck, he "then drove the truck in reverse at a high rate of speed directly toward another law enforcement officer (Sgt. Mark Dannels)." Plaintiff indicated that he "did not see the officer, but I concede that my conduct was reckless" and that "[i]n order to avoid being hit by my vehicle, Officer Dannels was forced to dive out of the way, landing in a cactus."

Dannels was forced to jump a wire fence and land in a thorned agave cactus.

Plaintiff believes that the last shot was fired at him while he was driving away. Taken specifically in the light most favorable to Plaintiff, the Court shall assume that Defendant Horan "fired at least one shot after Mason came through the gate" attempting to leave the premises. However, even with this assumption, Plaintiff has not shown a deprivation of a constitutional right. For instance, Plaintiff does not dispute that "[a]fter firing the initial shots and [after Plaintiff's vehicle] had passed through the entry, Agent Horan went to the other side of the fence to get between Mason's vehicle and Sgt. Dannels who was still stuck in the cactus." Therefore, the significance Plaintiff places on the fact that he had already passed through the gate when the last shot was fired is undermined by the fact that Officer Dannels was also now on the other side of the gate. Moreover, Plaintiff's contested statement of facts fails to dispute that "[a]fter passing through the entry, Mason stopped the truck in an open area a short distance from Sgt. Dannels, stared at Sgt. Dannels lying in the cactus and again began revving his engine."[8] Under these circumstances, it was not unreasonable for Defendant Horan to fear that Plaintiff would again choose to put his truck into reverse and attempt to run over Officer Dannels. Defendant Horan's fear is particularly

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[8]Plaintiff's plea agreement indicated that he did not see Officer Dannels when Plaintiff was putting his car in reverse, but Plaintiff's plea does not address the moment when Plaintiff was allegedly leaving the area. Plaintiff's contested statement of facts does not deny these statements.

reasonable in light of the small physical area involved in this case.[9] It is uncontested that the last shot occurred when Plaintiff's truck was still within twenty-five feet of the downed Officer Dannels. Defendant Horan's conduct is even more reasonable in light of the fact that he ceased firing once Plaintiff drove his truck on to the street. In light of these facts, it cannot be expected that Defendant Horan knew that Plaintiff's subjective intent was not to cause serious or deadly harm to him and his fellow officers. Therefore, Defendant Horan's actions were reasonable under the totality of the circumstances, and no constitutional right was violated.

According to *Saucier*, once a court has determined that no constitutional right was violated, then no further inquiry regarding qualified immunity is necessary. *Saucier*, 121 S.Ct. at 2156. However, because the law did not put Defendant Horan on clear notice that his actions, under the specific situation confronted, were violative of clearly established law under the Fourth Amendment, the Court shall also address this step.

B. Clearly Established Law

In *Saucier*, the Supreme Court stated that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Saucier*, 121 S.Ct. at 2158. The Supreme Court observed that "[a]n officer might correctly perceive all of the relevant

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[9]Exhibits 5 and 6 to Defendant Horan's Motion for Summary Judgment contain photographs of the residential lot involved in this case. The photographs provide a telling illustration of the very limited physical space involved in this incident.

facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* As such, the Supreme Court concluded that "[i]f the officer's mistake as to what the law requires is reasonable,[] the officer is entitled to the immunity defense." *Id.*

Analysis

In this case, Defendant Horan argues that the law in this circuit did not put him on clear notice that his conduct was unlawful. Specifically, Defendant Horan argues that

> [t]he courts simply have not addressed facts, where to protect the life of another, an officer firing a series of shots at an assailant in a truck on a residential lot, during which the assailant forms the intent to leave the premises in his truck and heads in the direction of the street, but the officer is not sure whether he would leave or would instead assault the victim again, continued to fire his weapon until the assailant was on the street.

Defendant Horan argues that in light of the absence of any clear and specific legal standard, the Supreme Court's ruling in Saucier requires a finding that Defendant Horan's conduct is entitled to the protection of qualified immunity as a matter of law.

In order to assess whether Defendant Horan was on notice that his actions violated Plaintiff's constitutional rights, this Court must consider the law of this circuit at the time of the incident, which was February 13, 1998. At the time of the shooting, Defendant Horan was on clear notice that he could use deadly force to prevent escape if he had probable cause to believe that the suspect posed a threat of serious physical harm, either to him or to others. *Graham*, 490 U.S. at 387. Defendant Horan was also

on notice that if the suspect threatened him or a fellow officer with a weapon or if there was probable cause to believe that the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm, then deadly force could be used if necessary to prevent escape. *Garner*, 471 U.S. at 11-12. Defendant Horan was also on notice that "the justification for the use of deadly force does not continue indefinitely. If circumstances change, and the danger abates, it will be unreasonable to continue using deadly force." *Hopkins v. Andaya*, 958 F.2d 681, 887 (9th Cir. 1992). However, the notice provided in *Hopkins* is factually distinct from the situation confronted by Defendant Horan. In *Hopkins* a police officer continued to shoot a suspect after the suspect had already been shot several times, no longer had possession of a weapon, and therefore ceased to be dangerous. *Id.* at 874. In this case, Plaintiff continued to be in possession of a deadly weapon, his truck, and continued to present a real and present danger to the officer's safety.

The law in this circuit at the time appears to have been somewhat unsettled. For instance, in *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir.1997), the Ninth Circuit affirmed that "[o]fficers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." But, in *Forrett*, 112 F.3d at 420, this circuit indicated that "[t]he suspect need not be armed or pose an immediate threat to the officers or others at the time of the shooting." In *Forrett*, this circuit concluded that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction

or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* (citing *Garner*, 471 U.S. at 11-12 (emphasis omitted)).

Consequently, the law did not put Defendant Horan on clear notice, in any particularized or relevant sense, that he was violating Plaintiff's constitutional rights in the specific context of the situation he confronted. Defendant Horan was forced to make a split-second decision regarding the safety of a fellow officer. His decision was understandably influenced by his knowledge of Plaintiff's criminal history, which included incidents of violence, his objective observation of Plaintiff driving his truck in reverse at a high rate of speed in the direction of a fellow officer, the close proximity of the reckless driving near the officer, and Plaintiff's attempted flight. Defendant Horan was not on clear notice that his actions would constitute a violation of Plaintiff's constitutional rights, and he is entitled to qualified immunity.[10]

2. Pendent Jurisdiction over State Tort Claim of Assault

Having determined that Defendant Horan is entitled to qualified immunity as to the excessive force claim, it appears that the only claim remaining in this

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[10]Nor can it be said that Defendant Horan's "conduct [was] so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional. . . ." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994)(quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)).

case is Plaintiff's claim for assault under Arizona state law. The fact that this Court has dismissed all the federal claims in this case does not mean that this Court must decline jurisdiction over the remaining state law claim. Rather, this Court has discretion to retain supplemental jurisdiction over the state law claim. See 28 U.S.C. § 1367 (c) (3); *see also Brady v. Brown* 51 F.3d 810, 816 (9th Cir. 1995). In fact, it may be an abuse of discretion not to exercise jurisdiction where factors of judicial economy and fairness support retention. *See Batiste v. Island Records, Inc.*, 179 F.3d 217, 227 (5th Cir. 1999). In light of the lengthy procedural posture of this case and the fact that the state law claim is neither complicated nor novel, this Court elects to retain supplemental jurisdiction over Plaintiff's state law claim for assault.

Plaintiff's assault claim is premised on the same events as the claim for excessive force.[11] Because Defendant Horan is entitled to qualified immunity for his conduct, Plaintiff's state law claim for assault is inadequate as a matter of law. See A.R.S. 12.820.02. As such, Plaintiff Is assault claim must be dismissed for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6).

Accordingly,

IT IS ORDERED that Defendant Horan's "Motion to Reconsider in Light of New Supreme court Precedent" is GRANTED.

IT IS FURTHER ORDERED that Defendant Horan's

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[11]Although the United States has substituted itself as the defendant in Plaintiff's state tort claim for assault, Defendant Horan's qualified immunity status is nevertheless dispositive of this claim.

motion for summary judgment regarding Plaintiff's excessive force claim is GRANTED on the basis of qualified immunity.

IT IS FURTHER ORDERED that Defendant Horan is DISMISSED from this case as there are no remaining claims against him.

IT IS FURTHER ORDERED that Defendant Horan's "Motion to Stay Proceedings" is DENIED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's state claim of assault is DISMISSED pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine, filed April 27, 2001, is DENIED AS MOOT.

IT IS FURTHER ORDERED that Defendants' "Motion to Preclude Expert Testimony" filed April 11, 2001 is DENIED AS MOOT.

IT IS FURTHER ORDERED that, having no further claims pending, this case is DISMISSED.

DATED this 15th day of March, 2002.

_____

John M. Roll
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY MASON, Plaintiff,	)	No. CV 99-15 TUC JMR
v.	)	
UNITED STATES, et al., Defendants.	)	ORDER

Pending before the Court is Defendant Agent Horan's Motion for Summary Judgment. For the reasons stated below, Agent Horan's motion is granted as to Plaintiff Danny Mason's unlawful arrest claim and denied as to Plaintiff's excessive force claim.

Procedural Background

On January 11, 1999, Plaintiff filed a complaint alleging two *Bivens* claims and two state law tort claims arising out of an incident that occurred while DEA Agents Horan and Townsend and Cochise County Sheriff's Officer Sgt. Dannels were investigating a residence as part of a joint federal-state task force. Plaintiff alleges that the officers attempted to restrain him from leaving the residence without just cause and that Agent Horan shot him as Plaintiff left the premises in his truck. The complaint initially brought four claims against all Defendants. (1) *Bivens* claim for unlawful search and seizure; (2) *Bivens* claim for excessive force; (3) state law claim for false arrest; and (4) state law claim for assault. Thereafter, the Court granted Defendants' unopposed motion to substitute the United States as the proper party for counts three (false arrest) and four (assault). On April 21, 1999, Attorney Vernon Edward Peltz filed a notice of appearance as attorney for Plaintiff Danny Mason.

On July 8, 1999, Plaintiff filed a motion to amend

complaint, which the Court denied. Therefore, the only remaining claims against Agent Horan are counts (1) unlawful search and seizure, and (2) excessive force. On November 15, 1999, Agent Horan filed a motion for Summary Judgment regarding the claims against him. On December 15, 1999, Plaintiff filed an opposition to Agent Horan's motion.[1] For the reasons stated below, Defendant's motion is granted in part and denied in part.

Factual Background

In February 1998, the DEA and Sierra Vista Police Department conducted a joint task-force investigation of methamphetamine distributors in Sierra Vista. The investigation resulted in the arrest of 38 criminal defendants. As part of that investigation, on February 13, 1998, Agents Horan and Townsend, and Sgt. Mark Dannels were questioning Kris Barnard at her residence. After obtaining Barnard's consent to search her home, the officers found small bags of methamphetamine, hypodermic syringes, and a loaded .25 automatic handgun.

While the officers were questioning Barnard, Plaintiff drove up to the house in his truck. Sgt. Dannels warned Agents Horan and Townsend that Plaintiff had a long history of combative behavior towards law enforcement officers. He also stated, "[h]e is leaning towards the passenger side of the cab, and it looks like he may have put something under the seat." (Defendants' Motion for Summary Judgment

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[1]On January 10, 2000, the Court granted Defendants' Motion to Preclude/Strike the Affidavit of Michael Levine. Accordingly, the Court will not consider the affidavit or arguments related to it in resolving this summary judgment motion.

(DMSJ), Exhibit 1, at 49).

Plaintiff exited his truck, walked up to the door, and was greeted by Barnard. Sgt. Dannels stepped forward and stated that "these two gentlemen are from DEA, and we would like to talk to you." (DMSJ, Exhibit 1, at 55).[2] Sgt. Dannels was in his sheriff's uniform, and Agents Horan and Townsend were wearing jackets with "DEA" written on the front and back. Agent Townsend also wore a cap with "DEA" written on its front, and Agent Horan wore a cap with "POLICE" written on its front. (DMSJ, Exhibit 1, at 55). After Sgt. Dannels asked to speak with him, Plaintiff turned away and began walking quickly to his truck.

Because Agent Horan was worried that Plaintiff was under the influence of methamphetamine and that he may have been attempting to retrieve a gun from the truck, he followed him. (DMSJ, Exhibit 2, at 86). The evidence demonstrates that there was a scuffle between Agent Horan and Plaintiff, and that Agent Horan reached into Plaintiff's truck to remove the keys, telling him that he was under arrest. Plaintiff started the truck and shoved Agent Horan, causing him to fall.

The truck lurched forward a short distance, stopped, then backed up, and went forward again. Agent Horan reports that he feared for his safety due to his proximity to the erratically driven truck. He was eventually able to move behind his car.

Plaintiff then put the truck in reverse and sped towards Sgt. Dannels, who was standing at the end of

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[2]Although he concedes that Sgt. Dannels asked to talk with him, Plaintiff contends that he was not aware of the DEA Agents' presence.

Barnard's driveway. It appeared to Agent Horan that Plaintiff intended to hit Sgt. Dannels with the truck.[3] Sgt. Dannels was able to jump over a wire fence and escape from the path of the truck.

According to Agent Horan, he began firing his sidearm at Plaintiff while the truck was being driven towards Sgt. Dannels. After the initial shots were fired, Plaintiff was able to maneuver his truck out of the entry of the driveway. According to Agent Horan, Mason stopped his truck about 25 feet from Sgt. Dannels, stared at him, and began revving the truck's engine. Fearful that Plaintiff was going to renew his attempt to run over Sgt. Dannels, Agent Horan stated that he again fired his sidearm at Plaintiff.

According to Plaintiff, however, he never intended to threaten the officers. He argues that he believed that he was free to leave Barnard's residence because he did not want to talk to Sgt. Dannels and that he never heard the officers telling him to stop. Plaintiff conceded at his sentencing that he had driven recklessly, but maintains that he did not intentionally threaten anyone with his truck. Additionally, according to Plaintiff's deposition, Agent Horan did not fire at him until he was leaving the area. (Plaintiff's Statement of Controverted Facts, Exhibit 5, at 104). Furthermore, in his affidavit, Plaintiff states that he was shot by "the last round fired at me as I was driving away." (DMSJ, Exhibit 7, at 123).

Although Plaintiff left the scene, the agents discovered him a short time later pulled over on a

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[3]In the related criminal proceeding, Plaintiff entered a plea of guilty to assaulting a federal officer, and admitted that he endangered the officers' lives by driving recklessly.

frontage road and arrested him.

Summary Judgment Standard

Summary judgment is proper where no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The initial burden rests on the moving party to point out the absence of any genuine issue of material fact. *See* Fed.R.Civ.P. 56(a); *Celotex*, 477 U.S. at 323. Once satisfied, the burden shifts to the opponent to demonstrate through production of probative evidence that an issue of fact remains to be tried. 477 U.S. at 323-24. The Court must accept the non-movant's evidence as true and view all inferences in the light most favorable to the non-movant. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987).

Discussion

Agent Horan contends that he is protected by qualified immunity and that the unreasonable search and seizure and illegal arrest claims against him should be dismissed. A law enforcement officer is entitled to qualified immunity unless his conduct violates "clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether Defendant Horan is entitled to qualified immunity requires a two-part test: 1) Was the law governing his conduct clearly established?; and 2) Under that law, could a reasonable law enforcement officer have believed his conduct was lawful? *See Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997). In this case, Plaintiff claims that his rights to he free from unlawful searches and seizures and the use of excessive force were violated.

Unlawful Seizure

Agent Horan argues that he is entitled to qualified immunity regarding Plaintiff's claim for unlawful search and seizure. In *Terry v. Ohio*, the Supreme Court ruled that law enforcement officers could briefly detain suspects for questioning based on a "reasonable suspicion" rather than probable cause. 392 U.S. 1 (1968). Pursuant to *Terry v. Ohio*, "police officers may make a brief, investigatory stop of an individual upon less than probable cause, if under the totality of the circumstances, they can point to articulable facts which support a reasonable suspicion that the person stopped is engaging in or about to engage in a crime." *Guam v. Ichiyasu*, 838 F.2d 353, 355 (9th Cir. 1988). Additionally, "a police officer may pat down a suspect for weapons when he has reasonable suspicion that the suspect is armed." *United States v. Flippin* 924 F.2d 163, 165 (9th Cir. 1991).

In this case, Agent Horan possessed a sufficient basis to briefly detain and "pat down" Plaintiff pursuant to *Terry v. Ohio*. The officers observed Plaintiff arrive at a residence in which they had recently discovered methamphetamine and a handgun. Agent Horan was aware that Plaintiff was an associate of known methamphetamine dealers and had previously been convicted for possession. Agent Horan also had information that Plaintiff was personally involved in dealing illegal narcotics.[4]

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[4]Agent Horan had been informed by a confidential informant that Plaintiff had stated that "he believed that he might be under law enforcement surveillance, and for that reason he was turning over his drug sales to somebody else until things cooled off." ..(continued)

Furthermore, Agent Horan knew that Plaintiff had previously been convicted of a firearms offense and that a handgun was reported to be at his residence.[5] It was also known that Plaintiff had a history of confrontation with law enforcement and had recently been released from state prison. *See Paine v. Lompoc*, 160 F.3d 562, 566 (9th Cir. 1998) (police may rely on "other information or surrounding circumstances" to establish reasonable suspicion) (citation omitted).

Plaintiff's behavior once he became aware of the presence of a law enforcement officer also supports a finding of reasonable suspicion. He abruptly attempted to leave the residence as soon as Sgt. Dannels stepped forward and asked to talk to him. Plaintiff concedes that he had no desire to talk to law enforcement, and was attempting to leave the residence quickly to avoid being questioned.[6] *See United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir.

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[4] (Defendants' Motion for Summary Judgment, Exhibit 1, at 29).

[5]Plaintiff shared a residence with his daughter, Melissa, who was also linked to dealing methamphetamine. In the post-arrest interview of a suspect, Agent Horan was informed that Melissa had displayed either a .22 or 9 millimeter handgun, and stated that "she or they" had accepted the weapon in exchange for "dope." (DMSJ, Exhibit 1, at 35-36).

[6]Plaintiff's Opposition argues that Agent Horan's deposition reveals that he did not believe that he had a sufficient basis to enact a *Terry* stop on Plaintiff. This argument is not supported by the record. Moreover, qualified immunity is not judged by the subjective beliefs of the involved officer, but rather from the perspective of a reasonable....(continued)

1984) ("unusually nervous behavior" in reaction to law enforcement presence sufficient "to constitute reasonable suspicion for narcotics possession"); *United States v. Turner*, 815 F. Supp. 1332, 1335 (N.D. Cal. 1993) (suspect's failure to acknowledge a law enforcement officer supports finding of reasonable suspicion). Given these circumstances, a reasonable officer in Agent Horan's position would have possessed a reasonable suspicion that Plaintiff was committing an illegal activity and that he was armed. Accordingly, Agent Horan's decision to effectuate a *Terry* stop on Plaintiff was lawful. Plaintiff's violent reaction to Agent Horan's legitimate attempt to detain him constituted a sufficient basis for arrest.

Excessive Force

Defendant Horan argues that he is entitled to qualified immunity regarding Plaintiff's claim for excessive force. The controlling issue in an excessive force claim is reasonableness. "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than 20/20 hindsight." *Liston*, 120 F.3d at 976. The Supreme Court has established three factors to consider when determining reasonableness: 1) the severity of the crime; 2) whether the defendant posed an immediate threat to the safety of the law enforcement officers or others; and 3) whether the suspect actively resisted arrest or attempted to escape. *Id.* An officer's use of deadly force is reasonable if he "has probable cause to believe the suspect poses a significant threat of death or serious

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officer in the same situation. *See Liston*, 120 F.3d at 975. *See also Thompson v. Souza*, 111 F.3d 694, 698 (911 Cir.1997).

physical injury to the officer or others." *Tennesse v. Garner*, 471 U.S. 1, 3 (1985).

In the instant case, the issue is whether Agent Horan was justified in using deadly force against Plaintiff. As discussed above, Agent Horan claims that he began firing at Plaintiff as he was driving his car towards Sgt. Dannels. He maintains that he continued firing at Plaintiff after he had driven the truck out of Barnard's driveway because he believed that Sgt. Dannels' safety was still in danger.

As stated above, if a reasonable officer in Agent Horan's position would have believed that Sgt. Dannels' life was in danger, the use of deadly force would have been appropriate. However, Plaintiff stated in his deposition and affidavit that Agent Horan began firing at him as he was driving away. He also stated that he was hit by the last shot fired as he was leaving the area. It appears, therefore, that there is a genuine issue of material fact as to whether a reasonable officer would have believed that Plaintiff continued to pose a threat to Sgt. Dannels at the time he was shot.

Accordingly,

IT IS ORDERED that Defendant Agent Horan's Motion for Summary Judgment is GRANTED in part as to Plaintiff's unlawful search and seizure claim.

IT IS FURTHER ORDERED that Defendant Agent Horan's Motion for Summary Judgment is DENIED in part as to Plaintiff's excessive force claim.

DATED this 14th day of April, 2000.

JOHN M. ROLL
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY MASON, Appellant, v. UNITED STATES, et. al., Appellee.	))))))	Number 02-15837 Lower Court Docket Number CV-99-00015

Petition for Rehearing

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Terry v. Ohio,
392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

INTRODUCTION

The Appellant respectfully petitions this Court to rehear this matter. In counsel's judgment, the decision of the Court of Appeals completely ignores an entire issue that was thoroughly briefed by the parties. The opinion of this Court fails to address the issue of whether the dismissal of the Plaintiff's claims of unlawful seizure were proper. The opinion of this Court ignores the Plaintiff's argument that it was perfectly clear to Agent Horan that he did not have a reasonable suspicion to detain Mr. Mason before he attempted to grab him. And since Agent Horan knew he had no reasonable suspicion to detain Mr. Mason he also knew that his attempt to detain Mr. Mason was unlawful. Agent Horan testified that even with all the information that he knew about Danny Mason prior to the incident, he did not have enough information to arrest Mr. Mason, nor did he even have a reasonable suspicion to detain him. (ROA 75 #2).

The issue ignored by the opinion of this Court is whether an agent who knows that he does not have a reasonable suspicion sufficient to detain a citizen can ultimately resort to deadly force in his continuing effort to detain that citizen. In the case at bar, Agent Horan knew that he did not have a reasonable suspicion to detain the Plaintiff by his own admission. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Based upon Agent Horan's own statement, he is not entitled to qualified immunity because Agent Horan knowingly violated the law when he attempted to restrain Mr. Mason without a reasonable suspicion or probable cause. If Agent

Horan would have only permitted Mr. Mason to leave after he made it perfectly clear that he did not want to speak to the officers, Mr. Mason would not have been shot in the back as he was leaving.

Finally, the opinion of this Court fails to recognize that Mr. Mason was not a fleeing suspect, he was a fleeing citizen whom the officer had no right to attempt to seize. While *Tennessee v. Garner*, 471 U.S. 1, 102 S.Ct. 1694, 85 L.Ed.2d 1 (1985) may articulate the "standard for the use of deadly force against fleeing suspects," it has no application when the person fleeing is not a suspect. (Opinion at page 2). At the point Mr. Mason attempted to leave, he was not a suspect. Mr. Mason was not even a suspect by the admission of the very officer who was attempting to seize him.

ARGUMENT FOR REHEARING

Agent Horan testified that when he was at the mobile home belonging to Ms. Barnard, even with all the information he knew about Mr. Mason at that time, Agent Horan did not have enough information to arrest Mr. Mason. And the agent testified that he did not even have a reasonable suspicion to detain Mr. Mason. (ROA 75, #2). The undisputed facts indicate that after Mr. Mason entered the trailer on the day in question, Dannels said, "Hi Danny, These two gentlemen are from DEA, and we would like to talk to you." (Appellee's Brief, page 11). Then Mr. Mason replied, "I ain't fuckin' talking to you." (Appellee's Brief, page 12). That is when Agent Horan reached for Mr. Mason's arm.

Every action that occurred after Agent Horan grabbed Mr. Mason's arm in an attempt to detain him, without even a reasonable suspicion, was a direct and proximate result of the initial unlawful seizure by

Agent Horan.

When Agent Horan grabbed Mr. Mason, he seized Mr. Mason, and by so doing he violated Mr. Mason's constitutional right. Every reasonable officer would know he should not seize a person without probable cause or at least a reasonable suspicion of criminal wrong doing. The right of individuals to be free from unreasonable seizures has been clearly established since *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). And any officer who attempts to seize an individual when that officer knows he does not have even a reasonable suspicion to detain that individual is not entitled to qualified immunity. Once Agent Horan knew that he did not possess sufficient information to permit him to detain Mr. Mason, Agent Horan should have let Mr. Mason leave.

While the opinion of this Court discussed the issue of excessive force in light of Tennessee v. Garner, 471 U.S. 1 (1985), *Terry v. Ohio*, 392 U.S. 1 (1968), should have been considered before the excessive force question.

The Terry Court began its analysis by recognizing that;

> The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or

interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). *Terry v. Ohio*, 392 U.S. 1, at 5 and 6.

It was against this background that the Supreme Court began its careful balancing of the interests of the individual and the interests of the officer who has to be concerned for his safety in some circumstances. The decision in *Terry* was premised on Officer McFadden's reasonable belief that the three men he had been observing were probably armed.

Justice Harlan concurred in the *Terry* decision and Justice Harlan wrote that;

> In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Terry v. Ohio, 392 U.S. 1, at 32 and 33.

Justice White also felt compelled to write a concurring opinion in *Terry*.

Justice White wrote that;

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Terry v. Ohio, 392 U.S. 1, at 34.

The *Terry* Court also determined, among other things, that whenever a police officer restrains the freedom of a person to walk away, he has "seized" that person. Agent Horan restrained Mason's freedom to walk away when he grabbed Mr. Mason's shoulder as Mason left the Barnard-Gonzalez mobile home. By Agent Horan's own deposition testimony, he did not have probable cause or reasonable suspicion to detain Mr. Mason. It was this unlawful seizure of Mr. Mason that precipitated all of the subsequent events, including the shot that pierced the back window of his truck and entered Mr. Mason's back.

Not only does the opinion of this Court ignore the application of *Terry v. Ohio* to these facts, but the opinion also jumps to the conclusion that Mr. Mason is a fleeing suspect. All Mr. Mason was fleeing was the very officer who attempted to unlawfully seize him in the first instance. *Terry v. Ohio* stands for the proposition Mr. Mason was not obliged to answer

Agent Horan's questions, Agent Horan could not compel the answers, and Mr. Mason's refusal to answer furnished no basis for an arrest. *Terry v. Ohio* also stands for the proposition that while there is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. The opinion of this Court completely ignores the holding of *Terry v. Ohio* and the application of that case to the facts of the case at bar.

It is only by ignoring the application of *Terry v. Ohio* that the opinion of this Court can conclude that Mr. Mason was a fleeing suspect. *Tennessee v. Garner*, 471 U.S. 1 (1985) does not hold that officers may use deadly force to stop Mr. Mason, who was not a suspect, but merely refused to speak to Agent Horan. The opinion of this Court ignores the fact that Mr. Mason was only fleeing an unlawful seizure and no crimes were committed until after Mr. Mason attempted to flee.

CONCLUSION

The Appellant respectfully petitions this Court to rehear this matter because the decision of the Court completely ignores an entire issue that was thoroughly briefed by the parties. The opinion of this Court ignores the Plaintiff's argument that it was perfectly clear to Agent Horan that he did not have a reasonable suspicion to detain Mr. Mason before he attempted to grab him. And since Agent Horan knew he had no reasonable suspicion to detain Mr. Mason he also knew that his attempt to detain Mr. Mason was unlawful.

The issue ignored by the opinion of this Court is whether an agent who knows that he does not have a

reasonable suspicion sufficient to detain a citizen can ultimately resort to deadly force in his continuing effort to detain that citizen. If Agent Horan would have only permitted Mr. Mason to leave after he made it perfectly clear that he did not want to speak to the officers, Mr. Mason would not have been shot in the back as he was leaving. Finally, the opinion of this Court fails to recognize that Mr. Mason was not a fleeing suspect, he was a fleeing citizen whom the officer had no right to attempt to seize. Mr. Mason was not even a suspect by the admission of the very officer who was attempting to seize him.

Respectfully submitted this 3rd day of October, 2003.

_____

Vernon E. Peltz, Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

COMES NOW the undersigned attorney, and hereby certifies that pursuant to Circuit Rule 40.1 that attached petition for panel rehearing is:

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 1878 words

or

__ Monospaced, has 10.5 or fewer characters per inch and contains __ words or lines of text

or

_X_ In compliance with Fed.r.App.P. 32(c) and does not exceed 15 pages.

The Attorney signing below relied upon the word count of Word Perfect 8.1 to count the words contained within this brief.

DATED this 3rd day of October, 2003.

_____

Vernon E. Peltz

CERTIFICATE OF SERVICE

Two copies of the foregoing were mailed,
postage prepaid, on the 3rd day
of October, 2003, to:

Janet Martin
Assistant U.S. Attorney
405 West Congress St., Suite 480
Tucson AZ 85701-5040
Attorney for Defendant Horan

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY MASON, a single man, Plaintiff - Appellant,	)	No. 02-15837
	)	D.C. No. CV
v.	)	99-00015-JMR
DAVID HORAN, United States Drug Enforcement Agency; UNITED STATES OF AMERICA, Defendants - Appellees.	)	District of Arizona, Tucson
	)	
	)	ORDER

Before: HAWKINS, W. FLETCHER, Circuit Judges, and BREYER,* District Judge.

The petition for rehearing, filed October 3, 2003, is hereby DENIED.

*Honorable Charles R. Breyer, US District Judge for the Northern District of California, sitting by designation.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
(CIVIL ORDER--GENERAL)

Civil Case No. Civ. 99-15 TUC JMR
Date: March 9, 1999
Title Mason v. Horan

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HONORABLE JOHN M. ROLL

==========

On February 19, 1999, Defendants filed a motion styled as "Motion to Substitute the United States of America for Defendants David Horan and William Townsend As To Counts Three and Four." Plaintiff has not responded. Accordingly,

IT IS ORDERED that Defendants' motion is granted and that the United States be substituted for the defendants, David Horan and William Townsend, as to the third and fourth causes of action.

_____

JOHN M. ROLL
United States District Judge

APPENDIX G

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ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES FEDERAL DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff,	**NO. CIV 99-000115 TUC JMR**
v.	**NOTICE OF APPEARANCE**
DAVID HORAN, Agent, United States Drug Enforcement Agency, et al, Defendants.	(Assigned to J. Roll)

The undersigned attorney hereby files his notice of appearance for Plaintiff, DANNY MASON, in the above-numbered action pending before this Court.

DATED this 21ST day of April, 1999.

Vernon E. Peltz
Attorney for Plaintiff

CERTIFICATE OF SERVICE

COPIES of the foregoing mailed this
22nd day of April, 1999, to:

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, vs. DAVID HORAN, Agent, United States Drug Enforcement Agency, and JANE DOE HORAN; WILLIAM TOWNSEND, Agent, United States Drug Enforcement Agency, and JANE DOE TOWNSEND; MARK DANNELS Deputy, Cochise County Sheriff's Department, and JANE DOE DANNELS; LARRY A. DEVER, Sheriff, Cochise County Sheriff's Department; and COCHISE COUNTY Defendants.	NO, CIV 99-000 15 TUC JMR ORDER FOR DISMISSAL WITH PREJUDICE OF DEFENDANTS COCHISE COUNTY, DANNELS AND DEVER

The Stipulation for Dismissal with Prejudice of Defendants Cochise County, Dannels and Dever having been read, and good cause appearing therefor.

IT IS HEREBY ORDERED that Defendants Cochise County, Dannels and Dever be dismissed with prejudice from the above-entitled matter, each party to
bear their own costs and attorneys' fees.

DATED this 26 day of 1999.

John M. Roll
HONORABLE
UNITED STATES DISTRICT COURT

backup is, you know, there are a lot -- that's too sanitized or a vague situation.

Q. That's what I'm trying to understand is the parameters of what you believe.

The guy pointed a gun at you. This time he doesn't put it in the holster but throws it on the ground at your feet, puts his hands in the air, turns his back and runs away from you.

Are you justified in using deadly force?

MS. MARTIN: objection; improper hypothetical.

MR. LaMAR: Join.

A. BY THE WITNESS: I might be justified, but I wouldn't.

Q. BY MR. PELTZ: But you think you would be justified based on your training?

A. Based on a strict interpretation of the guidelines.

Q. That's what I'm getting at. Based on a strict interpretation of when you're able to use deadly force. He puts his hands in the air, threw the gun away, ran away. You could shoot at him, by the strict interpretation?

A. Right. Could and would are two different things.

Q. Any of those people Danny Mason?

A. No.

Q. Any of those people Kriss Barnard?

A. No.

Q. By the time we come around to the 13th of February, do you know whether there are any warrants for Mr. Mason's arrest?

A. No, I don't.

Q. Meaning you don't know?

A. I didn't have any knowledge that there were.

There may have been, but if there were, I wasn't aware of it.

Q. Do you think, based on everything you know that we've talked about, all of this information that you have, when you're sitting there on the 13th, that you have enough information to arrest Mr. Mason if you see him?

A. No.

Q. Do you think that you have enough information based upon everything that you know at that point to detain him with the reasonable suspicion detention you talked about?

A. No.

Q. So would it be fair to say, based on everything you know up to this point, if you were to

Q. The totality of everything you know before he gets to that house --

MS. MARTIN: That would include the observations he made?

MR. PELTZ: Everything.

MS. MARTIN: You haven't asked him about what observations he made.

Q. BY MR. PELTZ: Just before he comes to the door, taking everything that you know in total before these incidents --

A. Before he comes to the property? Before he's on the property?

Q. Yes.

A. Well, based on the recent information from the 12th and the 13th earlier, I would, if I had an opportunity to interview him regarding the half an ounce of methamphetamine that he had been in possession of less than twelve hours before, I would have interviewed him regarding that.

Q. Okay. The point I am trying to make, if he

would have said, "I don't want to talk to you," would you have enough information to say, "No, I'm going to detain you; you've got to talk"?

A. No.

Q. No. Okay. Now, shortly after that,

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY A. MASON, a single man, Plaintiff, v. UNITED STATES, et al, Defendants.	CIV-99-15 TUC JMR **DEFENDANTS' HORAN MOTION FOR SUMMARY JUDGMENT**

Pursuant to *Fed R. Civ. P. 56*, and in accordance with *Local Rules 1.9* and *1.10-L* of the District of Arizona, defendants, David Horan and Jane Doe Horan., appearing by and through their undersigned attorney of record, hereby move for summary judgment. This Motion is supported by the accompanying Memorandum of Points and Authorities, Statement of Facts, and all matters of record.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This action arises from the arrest and shooting of plaintiff on February 13, 1998. Plaintiff filed this action on January 11, 1999. (CR)[1/] Defendants David Horan and Jane Doe Horan are presently named in two counts of the complaint.[2/] These two counts allege

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[1/]The Clerk's Record is designated "CR" followed by the docket number.

[2/]On March 9, 1999, this Court allowed the substitution of the United States of...(continued)

constitutional torts based on *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Because the undisputed facts show that Agent Horan is entitled to qualified immunity, this Court should enter summary judgment in his favor.

FACTUAL BACKGROUND

In February, 1998, Agent Horan was participating in a joint task force investigation of methamphetamine distributors in Sierra Vista, Arizona which culminated in the arrest of thirty-eight criminal defendants. (SOF 2.) In the midst of the investigation, on February 13, 1998, Agent Horan came into contact with Plaintiff, Danny Mason (a narcotics trafficker and convicted felon) at a trailer located at 711 North Central, Sierra Vista, Arizona. (SOF 4.)

Earlier that day Kris Barnard, an occupant of the trailer, had given Agent Horan, DEA Task Force Agent William Townsend, and Cochise County Sheriff's Sgt. Mark Dannels consent to search the trailer. (SOF 5.) During the search, they found baggies containing white powder (which Barnard admitted was methamphetamine), hypodermic syringes, and a loaded .25 automatic pistol. (SOF 6.) After completing the search, the officers sat down at the dining room table to debrief Barnard. (SOF 7.) During this conversation they learned that Mason recently had attempted to mediate a dispute between Barnard's boyfriend, Adam Gonzales, and Heiko Dorner, both of whom were narcotics traffickers in the Sierra Vista area. (SOF 8.)

Although Agent Horan had never met Danny

America For Agent Horan for the common law torts of assault and false arrest. (CR 13.)

Mason, he was familiar with Mason's reputation and

criminal record. (SOF 9.) Agent Horan knew the following about Mason:

• In the summer of 1994, Mason was one of the last individuals to have contact with Charles Davidson, prior to his murder over a methamphetamine sale gone bad. Davidson was the boyfriend of Celia Brown, a methamphetamine trafficker. (SOF 10.)

• Mason was an associate of the operator of a clandestine methamphetamine laboratory who intentionally set the laboratory on fire and fired shots at the police when they attempted entry in March, 1995. (SOF 11.)

• In the summer of 1995, Agent Horan was involved in undercover negotiations with Cecilia Brown for methamphetamine, during which she threatened to have Agent Horan shot. When Brown was arrested, Mason's name and telephone number were found in Brown's possession. (SOF 12.)

• In March, 1995, Michael Shane Lohse was armed with a handgun when he sold methamphetamine to an undercover federal agent. According to a confidential informant, in the fall of 1995, Lohse and Mason were present at a house which Mason said he was suspending his narcotics trafficking because he thought he was being watched by the police. (SOF 13.)

• Mason recently had been released from prison following his conviction for a firearms violation. (SOF 14.)

• Mason associated with white supremacists who were known to carry weapons and explosives. (SOF 15.)

• On February 12, 1998, Agent Horan spoke to a cooperating defendant who told him that within the

previous ten days he had brokered a methamphetamine sale between Mason and a buyer at Mason's residence. While at the residence Mason's seventeen year old daughter showed him a handgun. (SOF 16.)

• On February 13, 1998, approximately two hours prior to the shooting, Agent Horan had been told by a source that on the evening of February 12, 1998, Mason had shown him one-half ounce of crystal methamphetamine which he had obtained from Heiko Dorner. Agent Horan knew that Heiko Dorner was a drug trafficker who had been connected to one or more murder-suicides in the Sierra Vista area. (SOF 17.)

Agent Horan also was aware that violence and guns are often involved in methamphetamine trafficking. (SOF 18.) On the basis of all this information, Agent Horan believed that Mason used and trafficked in methamphetamine, possessed weapons, and associated with violent criminals who also possessed and used firearms. (SOF 19.)

During the debriefing the officers heard a truck pull into the yard. (SOF 20.) Sgt. Dannels got up to look out the window. He recognized Danny Mason in a white pick up truck. (SOF 20.). Dannels warned the others that Mason had a history of being combative with police and that he just had been released from prison. (SOF 21.) He also stated, "He is leaning over towards the passenger side of the cab, and it looks like he may have put something under the seat." This led Agent Horan to believe that Mason might have placed a gun under the seat of his truck. (SOF 21.)

Agent Horan stood and moved to the side of the ten foot hallway entrance to the trailer waiting for

Mason to enter the trailer. (SOF 22.) After Barnard greeted Mason at the door, Sgt. Dannels stepped out to speak to him. Sgt. Dannels said, "Hi Danny. These two gentlemen are from DEA, and we would like to talk to you." (SOF 23.)

Dannels was dressed in his sheriff's uniform. Agents Townsend and Horan were wearing jackets with "DEA" written on the front, back and arms. Agent Horan wore a cap with "DEA" written on the front. Agent Townsend had a cap with "POLICE" written on the front. (SOF 24.)

Agent Horan saw that Mason was wearing a red bulky shirt that covered his waist. (SOF 25.) Because Horan thought that Mason might be concealing a weapon in his waistband (SOF 25), Agent Horan drew his weapon and held it along the side of the crease of his trousers as a precaution. Initially Mason hesitated, looked over at Agent Horan's gun, and stood compliant. Agent Horan then reholstered his weapon. (SOF 26.)

Agent Horan told Mason that he wanted to talk to him. Mason replied, "I ain't fuckin talking to you." Agent Horan reached for Mason's arm and was about to tell Mason that he needed to frisk him when Mason stated, "No, no way," and bolted towards the door. (SOF 27.) Agent Horan followed Mason and told him again that he wanted to talk to him. (SOF 28.)

Because of Mason's history, associates, and belligerent manner, Agent Horan had concern that Mason might be under the influence of methamphetamine. He also was concerned that Mason didn't plan on leaving but, instead, was going to the truck to retrieve a gun so Agent Horan followed Mason out of the trailer. (SOF 29.) As they neared the vehicle, Agent Horan asked Mason what he had put

under the seat. He also told him that he wanted to frisk and talk to him. Mason told Agent Horan to leave him alone. (SOF 30.)

When Mason reached the truck, Agent Horan told Mason to relax and tried to put his left hand against Mason's back in an unsuccessful attempt to guide him to the side of the truck to frisk him. (SOF 31.) As Mason entered the cab of the truck, he elbowed Agent Horan in the chest, then shoved him with his left hand as he reached for the ignition. (SOF 32.) Agent Horan told Mason that he was under arrest and they struggled over the keys. (SOF 33.) Meanwhile Agent Townsend was shouting, "Watch out for a gun." (SOF 34.) Mason started the truck and pushed Agent Horan away from the cab causing Agent Horan to fall against the driver's door. As Agent Horan fell, something on the door hooked onto his trousers, catching him to the door of the truck. (SOF 35.)

While Agent Horan frantically tried to free himself, Mason put the truck in gear and floored the accelerator. The engine revved loudly and the wheels of the truck began to spin. (SOF 36.) The truck lurched forward a couple of feet, stopped, backed a few feet, then went forward again. Agent Horan struggled to maintain his balance to avoid being run over. He spun free from the door and stumbled back onto the ground, still in close proximity of the tires of the truck. (SOF 37.)

Mason drove to the end of the fenced yard, the opposite direction from the front entry. This move provided an opportunity for Agent Horan to take cover behind his car. As Agent Horan took cover he noticed Sgt. Dannels at the entry of the driveway. (SOF 38.) Sgt. Dannels appeared to be moving some concrete blocks into the driveway to prevent Mason's escape.

(SOF 38.) Mason turned around in the cab of his truck and looked back for several seconds through the rear window towards the end of the driveway where Sgt. Dannels was standing. After Mason stopped his truck, Sgt. Dannels walked up toward the vehicle, thinking Mason was ready to give up. He had only taken a few steps towards the truck when Mason revved his engine and accelerated in reverse toward Sgt. Dannels. (SOF 39.) Dannels ran back toward the entry to avoid being run over. It appeared to Agent Horan that Mason was aiming the vehicle directly at Sgt. Dannels. (SOF 40.) Sgt. Dannels attempted to escape by jumping over the wire fence that surrounded the property. He landed in a thorned agave cactus located on the other side of the fence. (SOF 41.)

During the time that Sgt. Dannels was running up the driveway to avoid being hit, Agent Horan drew his weapon and fired a series of shots in an effort to protect him. (SOF 42.) After firing the initial shots and after the vehicle had passed through the entry, Agent Horan went to the other side of the fence to get between Mason's vehicle and Sgt. Dannels who was on the ground stuck in the cactus. (SOF 43.) Although the distance between the cactus and entry was approximately 200 feet from the street, Mason stopped the truck in an open area a short distance from Sgt. Dannels, stared at Sgt. Dannels lying in the cactus, and again began revving the engine. (SOF 44,45.) Observing this, Agent Horan and others present were fearful that Mason would make a second attempt to run over Sgt. Dannels. (SOF 46.) Accordingly, Agent Horan positioned himself between the truck and Sgt. Dannels and fired his weapon. (SOF 47.) From the time that Mason revved his

engine and charged his truck at Sgt. Dannels, through the time that Mason repositioned his vehicle just a short distance from Sgt. Dannels and revved his engine again, until Mason accelerated from the gate, Agent Horan fired approximately nine shots of the sixteen bullets in his weapon. The last shot was fired while Mason was slowly going forward shortly before he accelerated down the driveway toward the street. (SOF 48,49.) Agent Horan did not chase Mason into the street. He stayed near the gate where Sgt. Dannels was lying in the cactus. (SOF 52.)

Once Agent Dannels extricated himself from the cactus, the officers entered their vehicle to find Mason. They saw his truck a short time later pulled off along a frontage road. (SOF 53.) Mason and the agents exited their vehicles simultaneously. Mason walked in a confrontational manner towards the agents shouting, "You motherfuckers! I can't believe you fuckin' shot me!" (SOF 54.) One bullet had struck Mason in the back below his shoulder. (SOF 55.) The agents repeatedly told Mason he was under arrest and to get down to the ground. Moments later backup officers arrived to assist in the arrest. (SOF 56.)

Mason, who is over six feet and has a bulky build, did not respond to the command to get down to the ground. Instead, he kept yelling profanities. Mason kept walking and flailing his arms despite the attempts of officers to force him to the ground. Finally his legs were kicked out from under him. (SOF 57.)

Although on the ground, Mason continued to resist arrest violently swinging his arms. Agent Horan lost grip of Mason's arms several times. (SOF 58.) The police throughout the altercation repeatedly told Mason to stop struggling. (SOF 58.) In an effort to stabilize the situation and to end the resistence, Agent

Horan punched Mason in the temple once with his fist. Only then were the six officers finally able to get Mason handcuffed. (SOF 59.)

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment shall issue whenever the evidence before the district court shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To avoid summary judgment, a factual dispute must be both "genuine" and "material." A factual dispute is material if its resolution is determinative of an essential element of the non-moving party's case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Hence, the substantive law governing the claim or defense at issue will identify "material" factual disputes. *Id.*

"Genuineness," on the other hand, goes to the need to resolve a dispute of material fact. Rule 56 allows courts and litigants to "isolate and dispose of factually unsupported claims and defenses" by allowing the moving party to point to the absence of sufficient evidence to allow the trier of fact to find for the non-moving party on an essential element of the non-moving party's case on which the non-moving party bears the burden of proof at trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322. (1986). If the non-moving party fails to come forward with evidence showing that the trier of fact could find in its favor at trial, the dispute of fact is not "genuine" in the sense of Rule 56, and summary judgment must issue. *See Liberty Lobby*, 477 U.S. at 249; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

AGENT HORAN IS IMMUNE FROM SUIT

Pursuant to the holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), money damages against individual federal employees may be awarded for violation of a plaintiff's constitutional rights, where a defendant intentionally and knowingly acted to deprive an individual of those rights. However, law enforcement officers enjoy qualified immunity from civil damage claims unless their conduct violates "clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Qualified immunity is an absolute defense. This defense is broad enough to protect all but the incompetent or those who knowingly violate the law. *See Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 1097-98 (1986).

The Ninth Circuit has set forth a two-part inquiry in determining whether a public official is entitled to qualified immunity: (1) was the law governing the official's conduct clearly established?; and (2) even if the law was clearly established, could a reasonable officer have believed the conduct was lawful? *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

The first step is designed to identify the specific constitutional right violated. At first blush this may seem simple. It is not. As the Ninth Circuit noted in *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988), "the term 'clearly established right' may be somewhat misleading in that in some cases that relevant inquiry may be properly described as whether it is clearly established that **the particular act** by the public official constitutes a violation of the

right involved, rather than whether the right itself is clearly established." (emphasis added). The law in question must be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable officer. *Chew v. Gates*, 27 F.3d 1447 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1097 (1995). The plaintiff bears the burden of showing that the right purportedly violated was clearly established at the time of the alleged misconduct. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

The reasonableness of the officer's conduct comes into play under the second prong of two-part inquiry. When the action is based on the alleged use of excessive force under the Fourth Amendment, the reasonableness of the officer's conduct also comes into play, not as an element of the officer's defense, but as an element of the plaintiff s case. *Katz. v. United States*, No. 1999 WL 962026 (9th Cir., October 22, 1999).

Plaintiff s Fourth Amendment claims fail on both prongs of the *Souza* analysis. Plaintiff can not meet his burden to prove that Agent Horan's actions violated a clearly established statutory or constitutional right and, even if such a showing could be made, there is ample evidence that a reasonable officer would have believed that the actions taken toward plaintiff were lawful. Summary judgment, therefore, is appropriate.

The Plaintiff has alleged two *Bivens* counts in the complaint. Count one alleges that the detention, seizure and arrest of Mason violated his Fourth, Fifth and Fourteenth Amendment rights. Count two alleges that the Agent Horan used excessive force in violation of the Fourth and Fifth Amendments. (CR 1.) As a preliminary matter plaintiff's reliance on the Fifth

Amendment should be disregarded because the gravamen of both counts is the Fourth Amendment. [3/]

THE EXCESSIVE FORCE CLAIM

Under the Fourth Amendment, law enforcement officials may use only such force as is objectively reasonable under the circumstances . [4/] *Graham*, 490 U.S. at 397. "To resolve the merits of an excessive force claim, the question is whether a reasonable

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[3/] In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that an excessive force claim arising during an arrest "is most properly characterized as one invoking the protection of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures.'" *Id.* at 394. Accordingly, the Supreme Court held that "all claims that law enforcement officers have used excessive force ... deadly or not... in the course of an arrest ... should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Because Sgt. Dannels and Task Force Agent William Townsend are no longer parties to this suit, Defendants assume that Plaintiff is no longer relying on the Fourteenth Amendment.

[4/] Although reasonableness is traditionally a question of fact for the jury, summary judgment may be granted where the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances. *Scott v. Hendrick*, 39 F.3d 912, 915 (9th Cir. 1994). officer could have believed that the force used was necessary under the circumstances." *Katz* at 4. When

determining reasonableness the Court should pay careful attention to the following factors: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; (3) whether the suspect actively resisted detention or attempted to escape. *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997). The heart of this inquiry is need for the use of the force. *Id.* All determinations of unreasonable force must embody allowance for the fact that police officers often must make split second judgments about the amount of force that is necessary in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, 490 U.S. at 396-97.

An officer's use of deadly force is reasonable if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1,3 (1985); *see also Graham*, 490 U.S. at 396 (use of deadly force reasonable where the suspect poses an immediate threat to the safety of the officers or others). A suspect need not be armed or pose an immediate threat to the officers or others to pose a threat. *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997)

Deadly force also is reasonable when necessary to prevent the escape of a felony suspect who has committed a crime involving the infliction or threatened infliction of serious physical harm. *Tennessee* 471 U.S. at 11-12. Importantly, the Fourth Amendment does not require law enforcement to exhaust every alternative before using justifiable deadly force. *Forrett*, 112 F.3d at 420.

Under controlling law, it is clear that the force used by Agent Horan did not violate Mason's clearly

established rights and that Agent Horan could reasonably believe his conduct was lawful. First, Mason committed two felonies, when he assaulted Agent Horan and Sgt. Dannels. (SOF 61.) Second, Mason used deadly force in the commission of those felonies. Mason used his truck as a deadly weapon. He dragged Agent Horan who was caught in the door and aimed the accelerating truck and accelerating toward Sgt. Dannels. (SOF 35-41.) Third, Mason actively resisted his detention and arrest. Prior to the arrest, Agent Horan told Mason that he was under arrest. Mason responded to that statement by pushing Agent Horan, getting into his truck and starting his engine. (SOF 33, 35.) Thus, the three factors listed by the Ninth Circuit, *Liston*, were present in the instant case justifying the use of force by Agent Horan.

The fact that nine shots were fired does not diminish Agent Horan's right to use deadly force in response to Mason's deadly actions. Indeed the evidence demonstrates that Agent Horan exercised appropriate restraint. Mason manipulated his truck like a deadly weapon. Agent Horan only fired his weapon while Mason had the potential to kill Sgt. Dannels. As soon as it was evident that Mason was leaving and would not again shift into reverse, Agent Horan stopped shooting. (SOF 49-52.) Additionally, when the officers came upon Mason along the roadside Agent Horan did not use his weapon. Instead he attempted to restrain the combative felon. (SOF 57-59.)

THE ILLEGAL ARREST AND DETENTION CLAIM

Count one of the complaint alleges that Agent Horan violated Mason's constitutional rights because he did not have probable cause to arrest, search, or seize him. On March 1, 1999, Mason plead guilty to

assaulting Agent Horan and Sgt. Dannels. (SOF 61.) His admission to this Court of his guilt is proof that probable cause existed for his arrest. Therefore, Mason should be judicially estopped from claiming in this action that his arrest was unlawful. The doctrine of judicial estoppel is intended to protect against a litigant playing fast and loose with the courts, gaining an advantage by taking one position, than seeking to gain a second advantage by taking an incompatible position. *Bradley v. Harcourt*, 104 F.3d 267, 272 (9th Cir. 1996). Moreover, once convicted, count one will be barred by the United States Supreme Court's decision in *Heck v. Humphrey*, 411 U.S. 475, 489-90 (1973).

With respect to the search claim, there is no evidence in the record that supports that Agent Horan searched Mason. Even if there were, clearly there was justification to search Mason incident to his lawful arrest.

The only remaining Fourth Amendment issue is whether Agent Horan lawfully attempted to detain Mason for questioning and to pat him down for weapons. Agent Horan had justification to stop and frisk Mason pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). As the Ninth Circuit has noted, "The decision of a law enforcement officer to approach and temporarily detain someone in order to gather more information has been a fixed star in the law of arrest since *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880-81, 20 L.Ed.2d 889 (1968)." *Pellegrino v. United States*, 73 F.3d 934, 936, (9th Cir. 1996). Police are permitted to conduct limited searches during an investigatory stop when in light of their experience, they reasonably believe that criminal activity may be afoot, and that the suspects involved

may be armed and dangerous. *Losee v. Dearinger*, DMPD, 911 F.2d 48, 49. (8th Cir. 1990). Reasonable suspicion is a reasonable belief based on specific and articulable facts. *United States v. Flippin*, 924 F. 2d 163, 166, (9th Cir. 1991). What may otherwise appear to be innocuous behavior, such as walking away from the police, may give rise to a reasonable suspicion in context of other information or surrounding circumstances that police are aware of. *See Paine v. City of Lompoc*, 160 F.3d 562, 566 (9th Cir. 1998)

In the instant case Agent Horan had the right to temporarily detain Mason for questioning because he had reasonable suspicion that Mason currently was involved in methamphetamine trafficking. (SOF 19.) As set forth previously, among other things, a cooperating defendant told Agent Horan that within the previous ten days the cooperating defendant had brokered a sale of methamphetamine for Mason at Mason's residence. (SOF 16.) Two hours prior to the shooting, a source told Agent Horan that Mason had possessed one-half ounce of crystal methamphetamine the night before. (SOF 17.) Finally, Mason was approaching a residence in which methamphetamine had been found just minutes before, on a day when a number of fellow methamphetamine traffickers had been arrested. (SOF 3, 6.)

In addition, a reasonably prudent officer in the same circumstances would be warranted in the belief that his safety or that of others was in danger. *Flippin*, 934 F.2d at 166. When Mason pulled into the yard, Agent Horan knew the following: that Mason had recently been released from prison after serving time on a weapons charge; that a handgun had been present in Mason's residence within the previous ten

days; that Mason associated with white supremacists and traffickers who were known to be violent and carry weapons; that Mason had a history of being combative with police; and that Sgt. Dannels had seen him reach under the seat of the truck. (SOF 8, 9, 11, 12, 13, 14, 15, 16, 21.) Once Agent Horan saw Mason his concerns were heightened when he observed that his waistband was covered with a bulky shirt and his reaction to the officers' presence. (SOF 25.) Mason's behavior led Agent Horan to believe that he might be under the influence of methamphetamine, which often makes individuals under its influence erratic, irrational and aggressive. (SOF 29.) Any officer knowing this information would be justified in believing that his safety or the safety of others was at risk. Thus, Agent Horan had justification to stop and frisk Mason for his and the others' safety.

CONCLUSION

Plaintiff can not make a showing that Agent Horan violated any clearly established Fourth Amendment rights. Even if he could, no reasonable officer under the circumstances would have thought that his actions were unreasonable or unlawful. Agent Horan is entitled to qualified immunity. This Court, therefore, should enter summary judgment in his favor.

Respectfully submitted this 15th day of November, 1999.

JOSÉ de JESUS RIVERA
United States Attomey
District of Arizona

JANET K. MARTIN
Assistant U.S. Attorney

Original filed and copy of the foregoing
mailed this 15th day of November, 1999, to:
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY A. MASON, a single man, Plaintiff, v. UNITED STATES, et al., Defendants.	CIV-99-15 TUC JMR **STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS' HORAN MOTION FOR SUMMARY JUDGMENT**

Defendants David and Jane Doe Horan submit the following Statement of Facts in Support of their Motion for Summary Judgment.

1. David Horan is a Special Agent of the United States Drug Enforcement Administration (DEA), who possesses over twenty-three years of law enforcement experience. (Exhibit 2, p. 84.)

2. In February, 1998, Agent Horan was participating in a joint task force investigation of methamphetamine distributors in Sierra Vista, Arizona which culminated in the arrest of thirty-eight criminal defendants. (Exhibit 1, p.43; Exhibit 2, p. 85.)

3. As part of that investigation, a briefing was held was held at 6:00 a.m., on February 13, 1998. The briefing was held to discuss the execution of a number of arrest warrants for methamphetamine distributors in Sierra Vista. A number of arrests were made that morning. (Exhibit 3, p. 13.).

4. On February 13, 1998, Agent Horan came into contact with Plaintiff, Danny Mason, at a trailer located at 711 North Central, Sierra Vista, Arizona.

(Exhibit 2 p. 86.)

5. Earlier that day Kris Barnard, an occupant of the trailer, had given Agent Horan, DEA Task Force Agent William Townsend and Cochise County Sheriff's Sgt. Mark Dannels consent to search the trailer. (Exhibit 2, p. 85-86.)

6. During the search the agents and Sgt. Dannels found baggies containing white powder (which Barnard admitted was methamphetamine), hypodermic syringes and a loaded .25 automatic pistol. (Exhibit 2, p.86.)

7. After completing the search the officers sat down at the dining room table to debrief Barnard. (Exhibit 3, p. 23.)

8. During the conversation the officers learned that Mason had recently attempted to mediate a dispute between Barnard's boyfriend, Adam Gonzales, and Heiko Dorner, both narcotics traffickers in the Sierra Vista area. (Exhibit 1, p. 34, 47; Exhibit 2, p. 86.)

9. Agent Horan knew the facts contained in paragraphs 10-19 prior to his first contact with Danny Mason on February 13, 1998. (Exhibit 1, p.25; Exhibit 2, p. 84-86.)

10. In the summer of 1994 Mason was one of the last individuals to have contact with Charles Davidson, the boyfriend of Cecilia Brown, a methamphetamine trafficker, prior to his murder over a methamphetamine sale gone bad. (Exhibit 1, p. 25-26, Exhibit 2, p. 85.)

11. Mason was an associate of the operator of a clandestine methamphetamine laboratory who intentionally set the laboratory on fire and fired shots at the police when they attempted entry in March, 1995. (Exhibit 1, p. 24, Exhibit 2, p.84.)

12. In the summer of 1995, Agent Horan was

involved in undercover negotiations with Cecilia Brown for methamphetamine, during which she threatened to have Agent Horan shot. When Brown was arrested, Mason's name and telephone number were found in Brown's possession. (Exhibit 1, p. 25-26, Exhibit 2, p.84-85.)

13. In March, 1995, Michael Shane Lohse was armed with a handgun when he sold methamphetamine to an undercover federal agent. According to a confidential informant in the fall of 1995, Lohse and Mason were present at a house during which Mason said he was suspending his narcotics trafficking because he thought he was being watched by the police. (Exhibit 1, p. 28-29, 32; Exhibit 2, p. 85.)

14. Mason had recently been released from prison following his conviction for a firearms violation. (Exhibit 1, p.33, 39-40, Exhibit 2, p.85.)

15. Mason associated with white supremacists who were known to carry weapons and explosives. (Exhibit 1. p. 123.)

16. On February 12, 1998, Agent Horan spoke to a cooperating defendant who told him that within the previous ten days he had brokered a methamphetamine sale between Mason and a buyer at Mason's residence and that while at the residence Mason's seventeen year old daughter had showed him a handgun. (Exhibit 1, p. 35: Exhibit 2, p. 85.)

17. On February 13, 1998, approximately two hours prior to the shooting, Agent Horan had been told by a source that on the evening of February 12, 1998, Mason had shown him one-half ounce of crystal methamphetamine which he had obtained from Heiko Dorner. Agent Horan knew that Heiko Dorner was a drug trafficker who had been connected to one or

more murder-suicides in the Sierra Vista area. (Exhibit 1, p.36-37, 48, 122-123; Exhibit 3. p. 10.)

18. Agent Horan is aware that violence and guns are often involved in methamphetamine trafficking. (Exhibit 1, p. 38.)

19. Agent Horan believed that Mason used and trafficked in methamphetamine, possessed weapons, and associated with violent criminals who also possessed and used firearms. (Exhibit 1, p. 26, 34, 39.)

20. During the debriefing of Kris Barnard, the officers heard a truck pull into the yard. (Exhibit 1, p.49; Exhibit 4, p. 50.) Sgt. Dannels got up to look out the window. He recognized Danny Mason in a white pick up truck. (Exhibit 4, p. 50-5 1.).

21. When Sgt. Dannels saw Mason he warned the others that Mason had a history of being combative with police and that he had just been released from prison. (Exhibit 3, p. 24, 8 1; Exhibit 4, p.51-52.) He also stated, "He is leaning over towards the passenger side of the cab, and it looks like he may have put something under the seat," which led Agent Horan to believe that Mason might have placed a gun under the seat of his truck. (Exhibit 1, P. 49, 51.).

22. As Mason approached, Agent Horan stood and moved to the side of the ten foot hallway entrance to the trailer waiting for Mason to enter the trailer. (Exhibit 1, p.54.)

23. After Barnard greeted Mason at the door, Sgt. Dannels stepped out to speak to him. (Exhibit 1, p. 54.) Sgt. Dannels said, "Hi Danny. These two gentlemen are from DEA, and we would like to talk to you." (Exhibit 1, p.55.)

24. Sgt. Dannels was dressed in his sheriff's uniform. Agents Townsend and Horan were wearing

jackets with DEA written on the front, back and arms. Agent Horan wore a cap with DEA written on the front. Agent Townsend had a cap with POLICE written on the front. (Exhibit 1, p.55; Exhibit 3, p.21-23, 88-89).

25. Agent Horan saw that Mason was wearing a red bulky shirt that covered his waist. (Exhibit 1, p.56-57.) Because of this, Horan thought that Mason might be concealing a weapon in his waistband. (Exhibit 1, p.57-59.)

26. Agent Horan drew his weapon and held it along the side of the crease of his trousers as a precaution. (Exhibit 1, p.58-59.) Initially Mason hesitated, looked over at Agent Horan's gun and stood compliant. (Exhibit 1, p.59.) Agent Horan then reholstered his weapon. (Exhibit 1, p. 59.)

27. Agent Horan told Mason that he wanted to talk to him. Mason replied, "I ain't fuckin talking to you." Agent Horan reached for Mason's arm and was about to tell Mason that he needed to frisk him when Mason stated, "No, no way", and bolted towards the door. (Exhibit 3, p.30; Exhibit 1, p. 60; Exhibit 2, p.86,88.)

28. Agent Horan followed Mason and told him again that he wanted to talk to him. (Exhibit 3, p. 34.)

29. Based on Mason's history, associates, and belligerent manner, Agent Horan was concerned that Mason might be under the influence of methamphetamine and that Mason didn't plan on leaving, but instead, was going to the truck to retrieve a gun so Agent Horan followed Mason out of the trailer. Agent Horan was aware that individuals under the influence of methamphetamine often act erratic, irrational and aggressive. (Exhibit 1, p. 62-63; Exhibit 1, p.86-87; Exhibit 3, p. 62, Exhibit 4, p. 58-59.)

30. As they neared the vehicle, Agent Horan asked

Mason what he had put under the seat. He also told him that he wanted to frisk and talk to him. (Exhibit 1, p.68.) Mason told Agent Horan to leave him alone. (Exhibit 1, p.68.)

31. Once Mason reached the truck Agent Horan told Mason to relax and tried to put his left hand against Mason's back in an unsuccessful attempt to guide him to the side of the truck to frisk him. (Exhibit 1, p. 76).

32. As Mason entered the cab of the truck he elbowed Agent Horan in the chest, then shoved him with his left hand as he reached for the ignition. (Exhibit 1, p. 83-84: Exhibit 2, p. 87.)

33. Agent Horan told Mason that he was under arrest and they struggled over the keys. (Exhibit 1, p. 85, 87.)

34. Agent Townsend began shouting, "Watch out for a gun." (Exhibit 2, p.87; Exhibit 3, p. 40.)

35. Mason started the truck and pushed Agent Horan away from the cab causing Agent Horan to fall against the driver's door. As Agent Horan fell, something on the door hooked onto his trousers catching him to the door of the truck. (Exhibit 1, p. 87: Exhibit 4, p. 84.)

36. While Agent Horan frantically tried to free himself, Mason put the truck in gear and floored the accelerator. The engine revved loudly and the wheels of the truck began to spin. (Exhibit 1, p. 87-88.)

37. The truck lurched forward a couple of feet, stopped, backed a few feet, then went forward again. Agent Horan struggled to maintain his balance to avoid being run over. He spun free from the door and stumbled back onto the ground, still in close proximity of the tires of the truck. (Exhibit 1, p. 87, 88, 92, 129; Exhibit 4, p. 87.)

38. Mason drove to the end of the fenced yard, the opposite direction from the front entry. This move provided an opportunity for Agent Horan to take cover behind his car. As Agent Horan took cover he noticed Sgt. Dannels at the entry of the driveway. (Exhibit 1, p. 130.) Sgt. Dannels appeared to be moving some concrete blocks into the driveway to prevent Mason's escape. (Exhibit 1, p. 93; Exhibit 2, p. 87.)

39. Mason turned around in the cab of his truck and looked back for several seconds through the rear window towards the end of the driveway where Sgt. Dannels was standing. After Mason stopped his truck Sgt. Dannels walked up toward the vehicle thinking Mason was ready to give up. He had only taken a few steps towards the truck when Mason revved his engine, then accelerated the truck in reverse toward Sgt. Dannels. (Exhibit 1, p. 132, Exhibit 4, p. 102.)

40. Dannels ran back toward the entry to avoid being run over. It appeared to Agent Horan that Mason was aiming the vehicle directly at Sgt. Dannels. (Exhibit 1, p. 105, 127, 132-133.)

41. Sgt. Dannels attempted to escape by jumping over the wire fence that surrounded the property. He landed in a thorned agave cactus located on the other side of the fence. (Exhibit 2, p. 87-88; Exhibit 3, p. 58; Exhibit 4, p. 104, 107, 165; Exhibit, 6; Exhibit 5.)

42. During the time that Sgt. Dannels was running up the driveway to avoid being hit, Agent Horan drew his weapon and fired a series of shots in an effort to protect him. (Exhibit 1, P. 99, 101.)

43. After firing the initial shots and the vehicle had passed through the entry, Agent Horan went to the other side of the fence to get between Mason's vehicle and Sgt. Dannels who was on the ground stuck in the cactus. (Exhibit 1, p. 106.)

44. The distance between the cactus and entry to the yard was approximately 200 feet from the street. (Exhibit 7, p. 102.)

45. After passing through the entry, Mason stopped the truck in an open area a short distance from Sgt. Dannels, stared at Sgt. Dannels lying in the cactus and again began revving the engine. (Exhibit 1, 107, 109; Exhibit 3, p. 59-60, 66-69; Exhibit 4, p. 114-117, 167.)

46. Agent Horan and others present were fearful that Mason would make a second attempt to run over Sgt. Dannels. (Exhibit 1, p. 107-110; Exhibit 4, p. 115, 118,146.)

47. Agent Horan positioned himself between the truck and Sgt Dannels and fired his weapon. (Exhibit 1, p. 106.)

48. Agent Horan fired at least three rounds as Mason slowly moved forward toward the street. (Exhibit 1, p. 111, 113.)

49. The last shot was fired shortly before Mason began to accelerate down the driveway. (Exhibit 1, p. 112.) At the time, the truck was approximately twenty-five feet from Sgt. Dannels. (Exhibit 1, p. 111-112.)

50. When he fired the last round Agent Horan was still trying to eliminate the threat to Sgt. Dannels and attempting to prevent Mason's escape. (Exhibit 1, 113.)

51. Agent Horan fired approximately nine shots of the sixteen bullets in his weapon. (Exhibit 1, p. 115, 125.)

52. Agent Horan did not chase Mason into the street. He stayed near the gate where Sgt. Dannels was lying in the cactus. (Exhibit 4, p. 168.)

53. Once Agent Dannels extricated himself from

the cactus, the officers entered their vehicle to find Mason. (Exhibit 1, p. 115.) They found his truck a short time later pulled off along a frontage road. (Exhibit 1, p. 117, 124.)

54. Mason and the agents exited their vehicles simultaneously. Mason walked in a confrontational manner towards the agents shouting, "You motherfuckers! I can't believe you fuckin' shot me! " (Exhibit 1, p. 118, 136; Exhibit 2, p. 88, Exhibit 4, p. 128.)

55. One bullet hit Mason in the back, below his shoulder blade. (Exhibit 7, p. 18-19, 123.)

56. The agents repeatedly told Mason he was under arrest and to get down to the ground. (Exhibit 1, p. 136; Exhibit 4, p. 131.) Moments later backup officers arrived to assist in the arrest. (Exhibit 1, p. 19; Exhibit 4, p. 133.)

57. Mason, who is over six feet and has a bulky build, did not respond to the command to get down to the ground. (Exhibit 1, p. 136.) Instead, he kept yelling profanities. (Exhibit 4, p. 131.) Mason kept walking and flailing his arms despite the attempts of officers to force him to the ground. Finally his legs were kicked out from under him. (Exhibit 1, p. 120, 136-138.)

58. On the ground Mason continued to resist arrest violently swinging his arms. Agent Horan lost grip of Mason's arms several times. (Exhibit 1, p. 136-137.) The police throughout the altercation repeatedly told Mason to stop struggling. (Exhibit 4, p. 138.)

59. In an effort to stabilize the situation and to end the resistence, Agent Horan punched Mason in the temple once with his fist. Once he was struck the six officers were able to get Mason handcuffed. (Exhibit 1, p. 120-121, 139; Exhibit 4, p. 134.)

60. At his deposition on April 23, 1999, Mason was asked the following question, "And you don't have any information to dispute that at least [Agent Townsend] thought you put both Sergeant Dannels and Agent Horan in risk of death or serious injury and that he decided he might shoot at you but didn't shoot at you. You don't have any facts to dispute that, do you?" Mason answered, "No." (Exhibit 7, p. 127.)

61. On March 1, 1999, Mason plead guilty to an indictment which charged him with assaulting Agent Horan and Sgt. Dannels on February 13, 1998, in violation of 18 U.S.C. 111 (a) and (b), and 18 U.S. C. 1114. (Exhibit 8, Exhibit 9.)

Respectfully submitted this 15th day of November, 1999.

JOSÉ de JESUS RIVERA
United States Attorney
District of Arizona

_____

JANET K. MARTIN
Assistant U.S. Attorney

Original filed and copy of the foregoing
mailed this 15th day of November, 1999, to:

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Attorney for Plaintiff

LIST OF EXHIBITS

Exhibit #1 - Deposition of Special Agent David Horan
Exhibit #2 - Exhibit 1 to Deposition of SA David Horan
Exhibit #3 - Deposition of Task Force Agent William Townsend
Exhibit #4 - Deposition of Sgt. Mark Dannels
Exhibit #5 - Overhead photograph of 711 North Central, Exh. #2 of Deposition of Sgt. Mark Dannels
Exhibit #6 - Photograph of agave plant referred to as a cactus during depositions, Exhibit #3 to Mark Dannels' deposition Exhibit #7 - Deposition of Danny Mason
Exhibit #8 - Superseding Indictment of Danny Mason
Exhibit #9 - Transcript of Change of Plea in *United States of America v. Danny Mason*, CR98-287-TUC-JMR

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, vs. UNITED STATES, et. al.,	CIV-99-15 TUC JMR OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Danny Mason and responds to the Defendant Motion For Summary Judgment, as follows in the attached Memorandum.

DATED this 15th day of December, 1999.

Vernon E. Peltz, Attorney for Plaintiff

CONTROVERTED FACTS

In spite of all the of facts that Agent Horan "knew," many of which have been controverted by Mr. Mason, Horan stated that at the time Mr. Mason was at the trailer, Horan did not have sufficient information to arrest Mr. Mason or even detain him for a "reasonable suspicion" detention. Agent Townsend said the same thing. (CSOF 2 and 3)

Horan's statement that Dannels said Mason was putting something under the seat of the truck when he arrived at the trailer is controverted by both Dannels, Townsend, and Mason. (CSOF 8 and 12)

Horan states that Mr. Mason elbowed him in the chest as Mr. Mason entered the truck and that Mr. Mason then shoved him with his left hand as he reached for the ignition. This is controverted by Mr.

Mason who stated that Horan reached in to get the keys and Mr. Mason pushed his hand away. (CSOF 13)

Horan states that he fell against the door causing something on the door to hook on his trousers, catching him to the door of the truck. This is controverted by Townsend's statement that Horan fell to the ground and that Townsend was afraid he would get run over and by Mr. Mason's statement that it never happened. (CSOF 14)

Horan states that he fired a series of shots in an effort to protect Dannels, who was running up the driveway at that time. This is contradicted by Dannels who said he heard Horan's first shots when he was in the cactus. (CSOF 16) Obviously he was out of danger at that time.

Horan said that Dannels appeared to be moving concrete blocks into the driveway to prevent Mr. Mason from leaving. Dannels controverts this by saying he thought about the blocks, but the blocks were too small to do any good. (CSOF 15)

Horan states that he fired the last shot while Mr. Mason was going forward before he accelerated down the driveway toward the street, to protect Dannels. Townsend controverted this statement and said he saw no danger to Horan or Dannels once the truck was put in forward gear and was heading toward the highway. Dannels also controverts that statement by saying that at least one more shot was fired after Mr. Mason came through the gate. (CSOF 17) This is also controverted by Mr. Mason. (CSOF 17)

Mr. Levine states that Agent David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force by firing his weapon three to

five times at suspect Danny Mason when Mason, attempting to get his vehicle in position to flee the scene, did not represent a threat to life necessitating a "last resort" application of deadly force as required by law and regulations. (CSOF 16)

Michael Levine states that Agent David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force a second time, by firing his weapon three to five times at "at a clearly fleeing suspect", Danny Mason, and wounding him in the back. (CSOF 17)

Michael Levine believes that David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force a third time, by striking the badly wounded Danny Mason in the face with his fist, while Mason lay on the ground in the custody of police officers. (CSOF 18)

Mr. Levine believes that there is considerable evidence of deception found in the depositions and statements of Agent David Horan, Agent Townsend and Sergeant Dannels indicating a shared intent to cover up, distort and obfuscate the true events surrounding this incident in violation of DEA Manual requirements and state and federal law. (CSOF 19)

Mr. Levine believes there is considerable evidence of deception found in the depositions and statements of Agent Horan, Agent Townsend and Sergeant Dannels indicating a shared intent to cover up, distort and obfuscate the true information allegedly "known" by Agent Horan, concerning Danny Mason, prior to this shooting incident and that this too is in violation of DEA Manual requirements and state and federal law. (CSOF 20).

There is considerable evidence indicating that Agent Horan acted in a manner that evidenced a depraved indifference to human life, in violation of DEA standards of Conduct, state and federal law, and that, were Mr. Levine investigating this incident for DEA, he would recommend a fitness for duty examination. (CSOF 21)

In the deposition of Agent Horan on p. 14 (Exhibit 1) he is given a hypothetical to which he replies, "I might be justified, but I wouldn't," in speaking of the right to use force in a given situation. This evinces either a lack of knowledge and/or training in the permissible use of deadly force in making an arrest. Mr Levine knows of no guideline, other than those of a police state, that would allow shooting a fleeing suspect in the hypothetical example given. This is specifically prohibited in two places in the DEA Agents Manual. (CSOF 22)

In the deposition of Agent Horan on p. 100 (Exhibit 1) he states "...I thought I had hit him (referring to Mr. Mason) when he was going out..." This is yet another indication found in the depositions of the three officers involved that Horan fired at a fleeing suspect who was not directly threatening the life of anyone, in violation of all the regulation, rules and SOPS governing the use of Deadly Force that Mr. Levine has ever been exposed to in 34 years. It is specifically prohibited in two places in the DEA Agents Manual. (CSOF 22)

Agent Horan in his deposition did reluctantly admit that he struck the wounded Mr. Mason in the face with his fist, in violation of every arrest regulation of every law enforcement agency Mr. Levine has ever been associated with, including his years as a military police officer. And the fact that by the time he strikes

Mr. Mason he was aware that Mr. Mason had been shot and Horan still punches the wounded man in the face and then sits on him - deadly force under any criteria - is yet another indication that any DEA Inspector or supervisor would regard as a depraved disregard for human life and a need for a fitness for duty evaluation. (CSOF 426)

PLAINTIFF'S FACTUAL BACKGROUND

On February 13th 1998, Mr. Mason went to 711 N. Central Avenue in Sierra Vista, where Adam Gonzales lived, to get some of his tools that he had lent to Adam. Mr. Mason got out of his truck, left the door open, went up and knocked on the door. Kris Barnard, Adam's girlfriend, answered the door. Mr. Mason asked if Adam was home and Kris Barnard said, "No." Mr. Mason had just taken one step in to the trailer at that time. Then, Sgt. Dannels stepped into the hallway entrance and stated he would like to talk to Mr. Mason. Mr. Mason never saw Horan or Townsend in the trailer (Exhibit 7, Nos.3,4 and 5).

Mr. Mason told Sgt. Dannels that he did not want to talk to him and that he was leaving. At that time Mr. Mason turned around, exited the trailer and started to walk toward his truck, Mr. Mason was approximately one step away from the truck when somebody grabbed him by his left shoulder from behind, and it was a natural reaction to push the hand off. Prior to that moment, there was never any conversation between Agent Horan and Mr. Mason. Mr. Mason then jumped into the truck and closed the door. At that time a person he had not seen before reached into his truck and tried to get the keys. Mr. Mason pushed the person's hand out of the truck, and then started to back up to leave. (Exhibit 7, Nos. 6, 7, 8 and 9)

Mr. Mason was looking out the back window in order to see where he was going, and he thought he was going to clip the teal colored sedan parked behind Kris Barnard's car, so he stopped and then pulled forward to put his vehicle into a position to back out without hitting anything. He again looked out the back window so he could back out of the parking area into an open field. After going through the gate and into the field, he started to turn the truck to go forward to leave the area. After Mr. Mason was already past the gate and in the field he heard the first shots that were fired at him. At that time Agent Horan was still standing inside the fenced area. As he was backing out of the fenced area, he never saw Sgt. Dannels behind him anywhere. The first time he saw him was in the trailer hallway and the second time he was lying on the ground covering his head as if being shot at. Mr. Mason did not ever see Dannels in any cactus. There was a cactus some ways away from where he was lying. (Exhibit 7, Nos. 11, 12, 13 and 14)

Mr. Mason was thinking why in the world are these guys trying to kill him, so he put his truck in forward gear and proceeded to leave the area. Then Horan fired five more times as Mr. Mason was driving away. The last shot went through the rear window and hit Mr. Mason in the back. He was in pain and bleeding. His only thought was to get somewhere where there were witness so that when he stopped and surrendered to Sgt. Dannels, he would not be shot and killed. (Exhibit it 7, Nos. 15 and 16)

When the officers arrived where Mr. Mason had stopped, Mr. Mason was out of the truck and walking toward the officers saying, "I surrender." They had their guns pointed at him and were yelling at him to

get on the ground. Mr. Mason was never told he was under arrest until then. Mr. Mason then started going to the ground and when he was down on his knees, all three of the officers came up and slammed him to the ground. One of them was standing on his back and the other two were cuffing him. At that time Agent Horan slugged Mr. Mason twice in the side of his head, and broke his glasses. Mr. Mason believes that at that time he went into shock because the next thing he can remember is he was in the hospital with police officers all around him. A little over an hour later, he was transported to Cochise County Jail. (Exhibit 7, Nos. 15, 16, 17, 18, 19 and 20)

MEMORANDUM

DISPUTED FACTS ARE A CREDIBILITY ISSUE FOR THE JURY.

By Horan's own words at the time Mr. Mason was at the trailer Horan did not have any reason to stop or detain Mr. Mason even under the "reasonable suspicion" detention. Therefore, since he had no reason to detain Mr. Mason, when Horan laid his hand on Mason's shoulder in an attempt to keep him from leaving, Mr. Mason had every right to push his hand off, especially since he did not know that Horan was a DEA Agent. At that time, since Horan had no reason to detain Mr. Mason, his actions created the whole incident that followed. When Horan tried to get the key out of Mr. Mason's truck, he was still acting without authority to detain or arrest Mr. Mason. Mr. Mason still had a right to get in his truck and leave. These facts are crucial to this matter and constitute a dispute over a material fact. Furthermore, Mr. Levine's affidavit raises serious questions about the shooting. Mr. Levine believes that after Horan shot Mr. Mason, all three officers acted in concert to alter facts to help

Horan justify the shooting. Mr. Levine further believes that Horan's use of deadly force was excessive under the circumstances in violation of DEA Manuals, SOPS, and Accepted Law Enforcement Norms and Federal and State laws. This certainly creates a dispute of a material fact, rendering a summary judgment inappropriate.

All the disputed facts about the entire incident are a matter for the jury to decide, since the resolution of those facts depend greatly on credibility. It is the jury's province to determine credibility.

IMMUNITY

The defendants argue that Horan was a acting properly for a law enforcement officer under the circumstances. The Plaintiff argues that Horan's conduct was in violation of the DEA Manual, SOPS, and Federal and State law. Agent Horan should know, or be aware of, the rules that regulate his conduct as an agent. The DEA Manual provides regulations of officer conduct of all officers, and DEA manual specifically provides rules to regulate the use of force and deadly force. If any officer's conduct is in violation of accepted practices, then that officer's conduct is unreasonable, since the manual prescribes reasonable conduct for all officers. The Plaintiff believes that Horan lost control of his temper, and his loss of control resulted in his unjustified use of deadly force against Mr. Mason. Since Agent Horan knew of the rules that regulate his conduct, his actions were a knowing violation of the DEA Manuals and SOPS. As the government points out, immunity does not cover the incompetent or those who knowingly violate the law. This is also a disputed issue that is for a jury to determine.

In *Thompson v. Souza*, 111 F.3d 694 (9th Cir.

1997) the court did set up a two part test, the first part of which is whether the law governing the official's conduct was clearly established. In the instant case, Horan violated the Fourth Amendment when he attempted to physically try to stop Mr. Mason from leaving, when by his own words he did not have any basis for stopping or detaining him. The second prong of the test is whether a reasonable officer could have believed the conduct was lawful. It would be difficult to imagine a law enforcement officer who would not be aware of the strictures found in the Fourth Amendment regarding search and seizures, and would believe that Horan's conduct was lawful. Furthermore, even Horan admitted the conduct was not lawful when he stated he had no right to stop or detain Mason, to which his partner, Townsend, agreed.

The "clearly established right" set forth in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1998) provides that the particular act by the public official involved must constitute a violation of the right involved. In the instant case, we have already shown that Horan's act was a violation of the Fourth Amendment.

As stated in *Romero v. Kitsap County*, 93 1 F.2d 624, 627 (9th Cir. 1991), it must be proved that the right allegedly violated was clearly established at the time of the alleged misconduct. In the instant case it is not difficult to prove that the Fourth Amendment right to be safe from unreasonable searches and seizures was clearly established at the time of Horan's conduct. And when that is established, the officer must then prove that the conduct was reasonable. By Horan's own words, he knew his action was not reasonable because he knew he was not justified in

detaining Mr. Mason.

Katz v. United States, No. 1999 WL 962026 (9th Cir. October 22, 1999) is not yet a published decision, which therefore, should not be relied upon. However, the plaintiff has two fourth amendment claims, one for an unlawful attempt to detain Mr. Mason, and one for the excessive use of force following the attempted detention. For the first, the officer must prove that his conduct was reasonable. The same would apply to the excessive force claim until such time that the *Katz* decision becomes published. Additionally, plaintiff agrees that the gravamen of both *Bivens* counts are in the Fourth Amendment, not the Fifth Amendment.

EXCESSIVE FORCE CLAIM

As stated in *Graham v. M.S. Connor*, 490 U. S. 386, 109 S.Ct. 1865, 014 L.Ed.2d 443 (1989) the resolution of excessive force claim involves the inquiry of whether a reasonable office could have believed the force was necessary under the circumstances, and that three factors should be considered in resolving that issue; 1) the severity of the crime at issue, 2) whether the suspect posed an immediate threat to the safety of officer or others, 3) whether the suspect actively resisted detention or attempted to escape.

In the instant case, the plaintiff alleges that he only pushed Horan's hand away when he grabbed him by the left shoulder. At the time that Horan grabbed Mason, Agent Horan stated he did not have probable cause to arrest or even reasonable suspicion detain Mr. Mason. Even if he did have reason to detain Mr. Mason, the crime of pushing an officer's hand away is hardly a severe crime.

Secondly, there are very different facts presented by the parties regarding whether Mr. Mason posed an immediate threat to the safety of the officers or others,

nor was Mr. Mason a suspect at the time. Whether or not Mr. Mason posed an immediate threat to the safety of officers or others is something for the jury to decide based upon a determination of credibility, and after hearing all the different versions of the events.

Third, Mr. Mason was not a suspect when he was detained and he had every right to resist an unlawful detention by merely removing the offending hand form his shoulder. When Agent Horan attempted to detain Mr. Mason his only action, at that point in time, was he refused to talk to the officers. The officers involved admitted that they had no reason to detain Mr. Mason. In any case, when the officer in this case first attempted to use force by stopping Mr. Mason from leaving, he was not a suspect.

Mr. Mason was not attempting to escape, indeed he had done nothing from which he needed an escape. Also escape implies a fleeing felon, he merely attempted to leave because he did not wish to talk Horan. The alleged felony that he was "escaping from" was pushing away Horan's hand when he grabbed his shoulder and pushing Horan's hand out of the truck. However that occurred after the unjustified attempt to stop Mr. Mason. Since Horan had no right nor any lawful justification to grab his hand or take his keys, Mr. Mason was not guilty of any crime when he thwarted those attempts. Again, Horan's own words establish that he had no right or reason to detain Mr. Mason. That fact is not even a controverted fact, since both Townsend, Horan and Mr. Mason all agree on that fact.

The government argues that Horan did not violate Mr. Mason's clearly established right and Horan could believe his conduct was lawful because Mason committed two felonies, when he assaulted Horan and

Dannels. First, and most important, the two felonies that were committed were committed after the unjustified and unlawful attempt to detain Mr. Mason without reasonable suspicion. The government attempts to bootstrap Mason's pushing Horan's hand off his shoulder and out of his truck by using that very fact as a reason to detain Mr. Mason. Those acts happened after the officers attempted to detain Mr. Mason unlawfully, or without reasonable suspicion. The fact is that since Horan did not have a reason or right to detain Mr. Mason he committed an unlawful act when he grabbed Mr. Mason and when he tried to grab the keys. Because his conduct was unlawful, he was not acting in the performance of his duties. Secondarily, it is against DEA regulations to even attempt to reach into a vehicle to grab keys to stop the car. Once Agent Horan attempted to stop Mr. Mason in violation of the Fourth Amendment, he was not acting in the performance of his duties as an officer.

Second, the scenario about Mr. Mason dragging Horan, who was caught in the door, and "aimed" the truck at Dannels and accelerated toward Dannels, is controverted. The version of the events by each of the officers at the scene differs greatly. Mr. Mason contends that Horan was never stuck on his vehicle. Mr. Levine believes that there is serious evidence of deception and attempts to cover up by the officers. Therefore, it is the province of the jury to determine which version of events they will believe. Furthermore, none of the events that transpired that day would have happened had Horan just let Mr. Mason walk away, which he should have done, knowing that he did not have any right to detain him.

Third, Mr. Mason did not actively resist detention or arrest. He did not believe that Horan had any right

to detain him, which was true. And he did not resist arrest. When Horan was trying to keep Mr. Mason from getting into the truck and trying to get his keys, Horan not only had no right to do so, but he did not tell Mr. Mason that he was under arrest. Neither Townsend, Dannels or Mason ever heard Horan say he was under arrest, until the officers arrived where Mr. Mason had stopped his truck. Again, this is a controverted fact, that must be decided by the jury, who are the judge of the facts they choose to believe. Therefore as to the three factors of *Liston*, the alleged crime was not a severe one that would justify shooting Mr. Mason; whether the suspect posed an immediate threat to the safety of the officers or others is controverted; and whether Mr. Mason actively resisted lawful detention or attempted to escape is controverted. The government has not shown that the factors of *Liston* have been met by uncontroverted evidence.

The government further argues that firing nine shots does not diminish Horan's right to use deadly force, and that Horan only fired his weapon while Mason had the potential to kill Dannels. That too, is a controverted. Townsend stated that after Mr. Mason exited the gate he did not see any danger to Horan or Dannels. Horan stated that while Dannels was running up the driveway to avid being hit, Horan fired a series of shots to protect Dannels. Dannels said he heard the first shots when he was lying in the cactus (over the fence and out of harms way) Horan said that when he fired the last shot, he was still trying to eliminate the threat to Sgt. Dannels and attempting to prevent Mr. Mason's escape. However, Agent Townsend said that once the truck was put into forward gear and was heading toward the highway, he

did not see any danger to Horan or to Dannels. Dannels stated that Horan fired at least one shot after Mason came through the gate. It was the last shot fired that struck hit Mr. Mason in the back. Finally, Mr. Levine believes that the use of deadly force was completely unjustified, and Agent Horan should be considered as a candidate for a fitness for duty examination. Whether or not Mr. Mason manipulated his truck like a weapon as the government states is a factual question for the jury. The "fact" that Horan only fired his weapon while Mason had the potential to kill Dannels is controverted by Mr. Mason, Townsend and Dannels.

Also disputed is that as soon as it was evident that Mason was leaving, Horan stopped shooting. Again, all controverted facts that require the jury to determine which facts they will believe.

ILLEGAL ARREST AND DETENTION CLAIM

The government argues that Mr. Mason cannot complain that there was no probable cause to arrest, search or seize him because his claim in precluded by judicial estoppel pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) and *Bradley v. Harcourt*, 104 F.3d 277 (9th Cir. 1996). The facts in *Heck* were quite different. Heck had been convicted of manslaughter and then brought suit for damages, alleging there was no reason to arrest him for manslaughter. In this case, Mr. Mason is clearly alleging that Horan did not have any probable cause to detain or arrest him before he turned to leave. Any alleged assault came after Horan grabbed his shoulder. Whether or not Mr. Mason pleads guilty to assault, there is no judicial estoppel to prevent him from asserting that there was no probable cause for Horan to initially detain him, which Horan has

already agreed was the case.

The government argues that Horan lawfully attempted to detain Mr. Mason for questioning and to pat him down for weapons, and cites *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968) to buttress that argument. The facts were very different in *Terry* from the facts in the instant case. The officer in *Terry*, after observation of the suspect for a period of time, had reason to believe that three men, one of whom was Terry, were casing a store for a stick up. In the instant case, Horan stated that he did not have enough information to stop or detain Mason while he was in the trailer, thereby eliminating any idea that the attempt to detain Mr. Mason was lawful. Moreover, no one including the other two officers ever heard Horan tell Mr. Mason that he just wanted to pat him down for weapons. All Mason, Dannels and Townsend ever heard was Horan's statements that he wanted to talk to Mr. Mason.

The government states that Horan had a right to temporarily detain Mason for questioning because he had reasonable suspicion that Mr. Mason was currently involved in methamphetamine trafficking. That is, again, directly contradicted by Horan's own statement that he did not have enough information to detain Mr. Mason. Therefore all the facts that Horan "knew" prior to Mr. Mason entering the trailer do not help to establish any reason to detain. Horan's statement that at the time Mr. Mason was in the trailer, he did not have enough information to detain Mr. Mason, not even for a reasonable suspicion detention.

DATED this 15th day of December, 1999.

_____

Vernon E. Peltz, Attorney for Plaintiff

CERTIFICATE OF SERVICE

Copy of the foregoing mailed, postage prepaid, this ___ day of December, 1999, to:

Janet Martin
Assistant U. S. Attorney
110 S. Church Ave., Ste. 8310
Tucson, AZ 85701

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, vs. UNITED STATES, et. al.,	)	CIV-99-15 TUC JMR STATEMENT OF CONTROVERTED FACTS IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Danny Mason and submits the following Statement of Controverted Facts In Support of Opposition to Motion For Summary Judgment.

1. The government's Statement of Facts Number 2 stated that Agent Horan participated in a joint task force investigation of methamphetamine distributors in Sierra Vista, Arizona which culminated in the arrest of thirty-eight defendants. While that is true, what was not said is that Danny Mason was not one of those arrested, and that Agent Horan was aware of that fact. (Exhibit 1, p. 44, L. 1- 12)

2. The Plaintiff would controvert all the paragraphs (2,5,6,8,9,10,11,12,13,14,15,16,17,18, and 19) that imply that Agent Horan possessed sufficient information to justify the initial detention of Mr. Mason with Agent Horan's own deposition testimony. Agent Horan stated at his deposition that even with all the information he knew about Danny Mason prior to the incident, when they were in the trailer on February 13th, he did not have enough information to arrest Mr. Mason, or even a reasonable suspicion to detain him. (Exhibit 1, p. 44, L. 13-18; p. 48, L.20-24)

Agent Townsend admitted the same thing. (Exhibit 3, p. 3 1, L. 14-23)

3. In the government's Statement of Facts No. 19, the government alleges that Danny Mason is a narcotics trafficker. Mr. Mason has never been convicted or even charged with narcotics trafficking, which the government well knows, since the government questioned Mr. Mason about his priors and the only charges brought against him involving drugs were possession of marijuana charges. (Exhibit 5, p. 28-33) Mr. Mason states that he never trafficked in drugs but was only a recreational user in his affidavit. (Exhibit 7, No.22)

4. The government in its Statement of Facts 9 states that Agent Horan knew the facts contained in the Statement of Facts 10 through 19. Again, the government is implying that those facts were sufficient to provide Agent Horan with a reasonable belief that he could detain Mr. Mason. However, Agent Horan also stated that all of the facts that he knew prior to his contact with Danny Mason on the 13th of February, 1998, were insufficient for him to stop or detain Danny Mason at that time. (Exhibit 1, p. 48, L. 8-24)

5. The government's Statement of Facts, No. 11 alleges that Mason was an "associate of the operator (David Luna) of a clandestine methamphetamine lab." Mr. Mason's testimony was that David Luna was only an acquaintance that he knew from school, and hadn't seen more than a few times since, and had never been to David Luna's house. (Exhibit 7, No. 21)

6. The government's Statement of Facts No. 15 is controverted by Mr. Masons affidavit. (Exhibit 7, No. 24)

7. The government's Statement of Facts Number 21

asserts that after Sgt. Dannels saw Mr. Mason drive up, he warned the others that Mason had a history of being combative with police, that he had just been released from prison. First, in the government's exhibit 3 on page 24 all that Agent Townsend actually said was that Dannels told them that "he [Mason] fights," and there was no mention of Mr. Mason fighting with police, or having just been released from prison. On page 81 of exhibit 3 Agent Townsend only changes his testimony after being led by the government's attorney. Therefore, his own testimony is inconsistent. The government further asserts that Dannels told the others that, "He is leaning over toward the passenger side of the cab, and it looks like he may have put something under the seat," which led Agent Horan to believe that Mason might have placed a gun under the seat of his truck. The fact that Sgt. Dannels ever made that statement is controverted by the fact that when asked, Sgt. Dannels does not mention that he said anything about putting something under the truck seat in his deposition. (Exhibit 4, p.51, L.2-p.52, LA) Nor does Townsend in his deposition state that Sgt. Dannels told them that Mason put something under the car seat. (Exhibit 3, p. 24, L. 4-2 1) Dannels only said that he just told them to use general officer safety caution. (Exhibit 4, p. 5 1, L. 7-20)

8. In the government's Statement of Facts, Number 23 is controverted by Mr. Mason's affidavit. (Exhibit 7 No. 5, 6)

9. In the government's Statement of Facts, Number 25 and 26, Horan states that Mason was wearing a red, bulky sweater that covered his waist and that because Horan thought that Mason might be concealing a weapon in his waistband, Horan drew

his weapon and held it along the side of the crease of his trousers as a precaution. This statement conflicts with Horan's statement that Dannels said that it looked like Mason put something under the truck seat, probably a weapon.

10. The government's Statement of Facts Number 29 states that Horan was afraid that Mason didn't plan on leaving but was instead going to the truck to retrieve a gun. Again, this is a conflict with Horan's statement that he thought Mason might be concealing a weapon under his sweater.

11. In Number 30 of the government's Statement of Facts, Agent Horan states that as Mason neared the vehicle, he asked Mason what he had put under the seat and told Mason that he wanted to frisk and talk to him. That statement is controverted by Agent Townsend's deposition. Agent Townsend does not report any such conversation, but only that from the time Mason left the trailer to the time he was getting into the truck, Agent Horan only said he really wanted to talk to Mason. (Exhibit 3,p.33,L.18-p.40,L.10) It is also controverted by Mr. Mason when he states that prior to getting in the truck, Horan did not say anything other than he wanted to talk to Mason. (Exhibit 5, p. 81 through 83, Exhibit 7, No. 8)

12. In Number 32 of the government's Statement of Facts, Agent Horan states that as Mason entered the cab of the truck he elbowed Agent Horan in the chest, then shoved him with his left hand as Horan reached for the ignition. This is controverted by both Agent Townsend's and Sgt. Dannel's depositions. Sgt. Dannels stated that before Agent Horan tried to get the keys, Mason struck Horan and got in his truck. (Exhibit 4, p. 80, L. 15-p. 81, L. 7) Agent Townsend has a totally different scenario. He states that while

Horan and Mason were either at the stairs or near the end of the stairs (exiting the trailer) Mason pushed and struck Agent Horan. (Exhibit 4, p. 36. L. 14-p. 40, L. 13) Mr. Mason stated that Horan reached into the truck and Mason pushed his hand away. (Exhibit 5, p. 82, Exhibit 7, No. 9)

13. In Number 35 of the government's Statement of Facts, Agent Horan states that as Mason started the truck he pushed Horan away from the cab, causing Horan to fall against the driver's door. He further states that as he fell, something on the door hooked on to his trouser catching him to the door of the truck. Agent Townsend controverts that fact when he states that Horan fell to the ground. (Exhibit 3, p. 42. L. 18-p. 43, L. 24) Also, Sgt. Dannels stated that after Horan tried to take the keys, the truck started and abruptly went into reverse, and he saw Horan get spun, get caught in the door and go down on a knee. (Exhibit 4, p. 83, L. 8-20) Mason states that none of that ever happened. (Exhibit 5, p. 84)

14. In Number 38 of the government's Statement of Facts, Agent Horan stated that as he took cover behind his car, he noticed Sgt. Dannels at the entry to the driveway and Dannels appeared to be moving some concrete blocks into the driveway to prevent Mason's escape. (Exhibit 1, p. 97, L.6-19) However, Dannels stated that he was not intending to throw anything in the driveway. (Exhibit 4, p. 101, L.7- 15) Mason stated that he did not see any cinder blocks in the driveway (Exhibit 5, p. 101, L. 14-21)

15. In Number 42 of the government's Statement of Facts, Horan stated that during the time Sgt. Dannels was running up the driveway to avoid being hit, Horan drew his weapon and fired a series of shots in an effort to protect him. However, this is controverted by

Sgt. Dannels' statement that he heard Horan's first shots when he was in the cactus, in other words, after he had jumped out of the way. (Exhibit 4, p. 106, L. 6-17). This is also controverted by Mr. Mason's affidavit. (Exhibit 7 No. 13) Mr. Levine does not believe Agent Horan was justified in those actions. Mr. Levine indicates that Agent David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force by firing his weapon three to five times at suspect Danny Mason when Mason, attempting to get his vehicle in position to flee the scene, did not represent a threat to life necessitating a "last resort" application of deadly force as required by law and regulations. (Exhibit 6, p. 4, paragraph 2)

16. In Number 48, 49, and 50 of the government's Statement of Facts, Agent Horan stated that when he fired the last shot, he was still trying to eliminate the threat of Sgt. Dannels and attempting to prevent Mason's escape. These assertions are controverted by Agent Townsend's statement that once the truck was put in forward gear and was heading toward the highway, he did not see any danger to Horan or Dannels at that point. (Exhibit 3, p.73, L. 1-4) Sgt. Dannels stated that Horan fired at least one shot after Mason came through the gate. (Exhibit 4, p. 124, L.5-17). This is also controverted by Mr. Mason's affidavit. (Exhibit 7, No. 13, 15) Further, Mr. Levine states that Agent David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force a second time, by firing his weapon three to five times "at a clearly fleeing suspect," Danny Mason, and wounding him in the back. (Exhibit 6, p. 4, paragraph 4) Also, Mr. Levine points out that in the deposition of Agent

Horan on p. 100 (Defendant's Exhibit 1) he states, "...I thought I had hit him (referring to Mr. Mason) when he was going out... " This is yet another indication found in the depositions of the three officers involved that Horan fired at a fleeing suspect who was not directly threatening the life of anyone, in violation of all the regulations, rules and SOPS governing the use of Deadly Force that Mr. Levine has ever been exposed to in 34 years. It is specifically prohibited in two places in the DEA Agents' Manual (Exhibit 6, p. 5. paragraph 5) Also Mr. Levine noticed that on p. 109-110 of Horan's deposition, Agent Horan actually admits to firing at a fleeing vehicle which is against all regulations and SOPS known to govern the use of deadly force in this country. His tortured reasoning (p. 110) that "[Mason] still poses a threat to Dannels, myself and Townsend" is beyond comprehension and would not be accepted by me were I interviewing him as a DEA supervisor and/or Operational Inspector. (Exhibit 6, p. 6, paragraph 2)

17. In Number 59 of the government's Statement of Facts, Agent Horan indicates that he struck Mr. Mason in an attempt to end the resistence. This is controverted by Mr. Levine's opinion that Agent David Horan acted in violation of DEA Manuals, SOPS, Accepted Law Enforcement Norms and Federal and State laws in resorting to deadly force a third time, by striking the badly wounded Danny Mason in the face with his fist, while Mason lay on the ground in the custody of police officers. (Exhibit 6, p. 4, paragraph 5) Mr. Levine also indicates that S\A Horan in his deposition, p. 120-121 did reluctantly admit that he struck the wounded Mr. Mason in the face with his fist, in violation of every arrest regulation of every law enforcement agency I have ever been associated with,

including my years as a military police officer. And the fact that by the time he strikes Mr. Mason he was aware that Mr. Mason had been shot and Horan still punches the wounded man in the face and then sits on him (deadly force under any criteria) is yet another indication that any DEA Inspector or supervisor would regard as a depraved disregard for human life and a need for a fitness for duty evaluation.

18. There is considerable evidence of deception found in the depositions and statements of Agent David Horan, Agent Townsend and Sergeant Dannels indicating a shared intent to cover up, distort and obfuscate the true events surrounding this incident in violation of DEA Manual requirements and state and federal law. (Exhibit 6, p. 5, paragraph 1)

19. There is considerable evidence of deception found in the depositions and statements of Agent Horan, Agent Townsend and Sergeant Dannels indicating a shared intent to cover up, distort and obfuscate the true information allegedly "known" by Agent Horan, concerning Danny Mason, prior to this shooting incident and this too is in violation of DEA Manual requirements and state and federal law. (Exhibit 6, p. 5, paragraph 2).

20. There is considerable evidence indicating that Agent Horan acted in a manner that evidenced a depraved indifference to human life, in violation of DEA standards of Conduct, state and federal law, and that, were Mr. Levine investigating this incident for DEA, he would recommend a fitness for duty examination. (Exhibit 6, p. 5 paragraph 3)

21. In the deposition of Agent Horan on p. 14 (Exhibit 1) he is given a hypothetical to which he replies, "I might be justified, but I wouldn't," in speaking of the right to use force in a given situation.

This evinces either a lack of knowledge and/or training in the permissible use of deadly force in making an arrest. Mr Levine know of no guideline, other than those of a police state, that would allow shooting a fleeing suspect in the hypothetical example given. This is specifically prohibited in two places in the DEA Agents Manual. (Exhibit 6, p. 5 paragraph 4)

DATED this 15th day of December, 1999.

_____

Vernon E. Peltz, Attorney for Plaintiff

CERTIFICATE OF SERVICE

Copy of the foregoing mailed, postage prepaid, this 15th day of December, 1999, to:
Janet Martin
Assistant U. S. Attorney
110 S. Church Ave., Ste. 8310
Tucson, AZ 85701

Exhibit 7

IN THE UNITED STATES FEDERAL DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, v. DAVID HORAN, Agent, United States Drug Enforcement Agency, et al Defendants.	NO. CIV 99-00015 TUC JMR AFFIDAVIT OF DANNY MASON (Assigned to J. Roll)

STATE OF ARIZONA
County of Pima

I, Danny Mason, having been first duly sworn, to state and aver as follows:

1. 1 am fully competent to testify to the matters set forth in my affidavit.

2. I drew the diagrams attached to this affidavit, and to the best of my knowledge are true and correct, however they are not to scale.

3. On February 13", 1998, I went to 711 N. Central Avenue in Sierra Vista, where Adam Gonzales lived, to get some of my tools that I had lent to Adam.

4. I got out of my truck, left the door open, went up and knocked on the door. Kriss Barnard, Adam's girlfriend, answered the door.

5. I asked if Adam was home and Kriss Barnard said, "No." I had just taken one step in to the trailer at that time. Then, Sgt. Dannels stepped into the hallway entrance and stated he would like to talk to me. I never saw Horan or Townsend in the trailer.

6. I told Sgt. Dannels that I did not want to talk to him and that I was leaving. At that time I turned around, exited the trailer and started to walk toward my truck.

7. I was approximately one step away from the truck when somebody grabbed me by my left shoulder from behind, and it was a natural action to push the hand off me.

8. Prior to that moment, there was never any conversation between Agent Horan and myself.

9. Then I jumped into the truck and I closed the door. At that time a person I had not seen before reached into my truck and tried to get my keys. I pushed the person's hand out of the truck. I then started to back up to leave.

10. I was not under the influence of drugs nor alcohol at the time, which was proven when the hospital tested my blood for such substances, immediately after my arrest..

11. I was looking out the back window in order to see where I was going, and I thought I was going to clip the teal colored sedan parked behind Kriss Barnard's car, so I stopped and then pulled forward to put my vehicle into a position to back out without hitting anything.

12. I again looked out the back window so I could back out of the parking area into an open field. After going through the gate and into the field, I started to turn my truck to go forward to leave the area. (See diagram 1)

13. After I was already past the gate and in the field I heard the first shots that were fired at me. At that time Agent Horan was still standing inside the fenced area. (See diagram 2)

14. As I was backing out of the fenced area, I never

saw Sgt. Dannels behind me anywhere. The first time I saw him was in the trailer hallway and the second time I saw him he was lying on the ground covering his head as if being shot at. I did not ever see Dannels in any cactus. There was a
cactus some ways away from where he was lying. (See S-3 in diagram 3)

15. I was thinking why in the world are these guys trying to kill me, so I put my truck in forward gear and proceeded to leave the area. As I am pulling away from position S-3 in diagram 3, Agent Horan takes a new position, (See H-2 in diagram 3) and fires at me five times as I am driving
away.

16. The last shot went through the rear window and hit me in the back. I was in pain and bleeding. My only thought was to get somewhere where there were witnesses so that when I stopped and surrendered to Sgt. Dannels, I would not be shot and killed.

17. When the officers arrived, I was out of the truck and I walked toward the officers saying, "I surrender." They had their guns pointed at me and were yelling at me to get on the ground, mother fucker. I was never told I was under arrest until then.

18. I then started going to the ground and when I was down on my knees, all three of them came up and slammed me to the ground. One of them was standing on my back and the other two were cuffing me.

19. At that time Agent Horan slugged me twice in the side of my head, and broke my glasses.

20. I think at that time I went into shock because the next thing I remember is I was in the hospital with police officers all around me. A little over an hour later, I was transported to Cochise County Jail.

21. I was never an associate of David Luna. I went to school with him and I was at his house only a few times. I had no idea of what he was doing at any time. The house where I visited him a few times was in Sierra Vista. I had never been to his house in Bisbee where the lab incident occurred.

22. I was never involved in narcotics trafficking. I was only a recreational user, I was never a seller. I was convicted of possession of marijuana, and possession of a defaced weapon. I served almost three years of my life for that.

23. Prior to this incident I had been on parole for eight months. I had not been involved in any drug activity or breaking any law. That part of my life was over. I had rehabilitated myself and was determined to be a law-abiding citizen for the rest of my life. I was supporting myself and paying my fines by working a steady job.

24. I have never associated with any white supremacists, nor do I support such people in any way. I do not believe in what they stand for.

25. Defendant Horan's statement of facts No. 16 is a direct lie. There was no drugs or guns in my house. I was also on parole at that time, and I would not have risked having drugs or a gun at my house, or anywhere else.

26. I never knew Heiko Dorner was involved in drug trafficking and I never knew that he had any felonies. I did not purchase any drugs from him on February 12, 1998.

27. The dispute that I "mediated" was over a car repair that Adam Gonzales had agreed to perform on a car belonging to Heiko Dorner's girlfriend. Adam did not finish the repairs and Heiko was angry about that. I went to the junk yard, got the needed parts and

finished the repairs myself, to avoid a fight between Adam and Heiko.

28. I do not believe that Agent Horan believed that I used and trafficked in methamphetamine, possessed weapons, and associated with violent criminals who also used firearms.

I was on parole and could not be in possession of either drugs or weapons or associate with known felons. Any "belief" he had was either a figment of his imagination or from some informant who was lying.

Dated this 14th day of December, 1999.

_____

Danny Mason

SUBSCRIBED AND SWORN TO before me this 14th day of December, 1999.

_____

NOTARY PUBLIC
My comission expires 8/25/03

Copy of the foregoing mailed, postage prepaid, this 14th day of December, 1999, to:
Janet Martin
Assistant U.S. Attorney
110 S. Church Ave., Ste. 8310
Tucson, AZ 85701

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

1. Danny A. Mason, a single man, Plaintiff, v. 2. United States, et al., Defendants.	CIV-99-15 TUC JMR **DEFENDANTS' HORAN REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Defendants Horan, by and through their undersigned attorneys, hereby reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment. In his Opposition, Plaintiff attempts to raise an issue of material fact in order to defeat Defendants' Motion; however, a close review of the record demonstrates that the alleged disputed facts are not supported. Plaintiff relies upon his own self-serving affidavit which contradicts portions of his previously given sworn testimony and statements he admitted to in entering guilty pleas in the related criminal matter. Plaintiff recalls facts which he could not remember at deposition. Plaintiff makes impermissible inferences based on inadmissible evidence with foundational inadequacies. Plaintiff cites the unsigned affidavit of an unqualified expert. And Plaintiff mischaracterizes the testimony of numerous witnesses. Plaintiff's legal arguments to defeat summary judgment are based solely on his inadequate and improper factual assertions and thus

are similarly unpersuasive.

In this Reply, Defendants first address Plaintiff's failure to provide admissible evidence in support of his factual allegations. Defendants then address Plaintiff's legal arguments which are premised on the unsupported factual allegations.

In sum, summary judgment should be entered in favor of Defendants because the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, demonstrate that there is no genuine issue of material fact and the movant is entitled judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

I. The Inadmissible Factual Assertions
Plaintiff's Self Serving Statements

The Ninth Circuit has held that an inherently untrustworthy account does not create a triable issue of fact precluding summary judgment. *United States v. Check No. 25128 in the Amount of $58,654.11*, 122 F.3d 1263 (9th Cir. 1997.) Conclusory self-serving affidavits lacking detailed facts and any supporting evidence cannot defeat a motion for summary judgment. *Federal Trade Commission v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1996); *Patterson v. Chicago Association for Retarded Citizens*, 150 F.3d 719, 724 (7th Cir. 1998). The same can be said of affidavits whose conclusions contradict prior testimony or detailed affidavits which assert detailed recollection when the affiant has previously claimed a lack of knowledge as to those facts. *Patterson*, 150 F.3d at 724.

Plaintiff's affidavit is unreliable for several reasons. First, many of the assertions contained therein contradict statements made under oath in the related

criminal proceeding. On March 1, 1999, Plaintiff plead guilty to an indictment which charged him with assaulting Agent Horan and Sgt. Dannels on February 13, 1998, in violation of 18 U.S.C. §§ 111(a) and (b), and 18 U.S.C. §1114 (SOF 61; MSJ, Exh. 9) At the time of the plea, Plaintiff was placed under oath. (SOF, Exhibit 9, p. 9.) The court asked Plaintiff if he agreed with the factual basis contained in the written plea agreement. Plaintiff indicated that he did. (SOF 9, p. 12 - 13.) In the current action, Plaintiff's affidavit and opposition contradict much of the written factual basis which he also signed and dated. (Reply, Exh. 1, p. 5). Plaintiff's inconsistent positions are demonstrated by comparing the factual basis of the plea with Plaintiff's Opposition and affidavit.

For example, Plaintiff admitted in the factual basis to his plea that: "On February 13, 1998, in Sierra Vista, Arizona, I was approached by three law enforcement officers. They attempted to detain me in order to conduct an interview." (Exh. 1, p. 5.) In the civil action, Plaintiff claims he was approached only by Sgt. Dannels and that he didn't see the others in the trailer. (OMSJ p.5, OMSJ Exhibit 7 15.)

In the factual basis of the plea, Plaintiff admitted: "I refused to allow myself to be interviewed and attempted to leave. DEA agent David Horan attempted to physically prevent me from getting in my vehicle. In response I knocked him backwards with my left forearm. I then got into my vehicle and attempted to leave." (Exh. 1, p. 5.) In his Opposition to the Motion for Summary Judgment, Plaintiff omits his aggressive behavior, claiming that he was grabbed by the left shoulder from behind, and it was a natural reaction to push the hand off. (OMSJ Exhibit 7 P 7.)

Similarly, in his plea, Plaintiff admits that: "Agent

Horan reached inside my truck in an effort to turn off the engine. I struggled with the agent and attempted to push him out of the truck." (Exh. 1, p. 5.) In his Opposition, Plaintiff minimizes his resistance to law enforcement and his knowledge that the persons involved were law enforcement officers. Instead, he states: "Then I jumped into the truck and I closed the door. At that time a person I had not seen before reached into my truck and tried to get my keys. I pushed the person's hand out of the truck." (OMSJ Exhibit 7 ¶ 9.) [1/]

In the factual basis, Plaintiff admitted: "I then drove the truck in reverse at a high rate of speed directly toward another law enforcement officer (Sgt. Mark Dannels)." He further admitted: "I did not see the officer, but I concede that my conduct was reckless. In order to avoid being hit by my vehicle, Officer Dannels was forced to dive out of the way, landing in a cactus. At the time of this event, Sgt. Dannels was assisting federal law enforcement officers in the performance of their official duties." (Exh. 1, p. 5). In contrast, in his Opposition, Plaintiff portrays himself as a careful driver and deletes any reference to speed stating: "I then started to leave ... I was looking out the back window in order to see

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[1/] The statements of Sgt. Dannels and Agent Townsend, which at deposition each identified as being true and accurate, verify that the door was open at this time. (Exh.2, p. 1, Exh. 3, p. 2.) Sgt. Dannels' statement notes that Horan got caught on the door. Townsend's statement does not indicate whether he saw Horan hooked onto the door but states, "At this point, I observed that S/A Horan was falling while still in the open door, falling to the ground, near Mason."

where I was going and I thought I was going to clip the teal colored sedan car ... so I stopped and then pulled forward to put my vehicle in to a position to back out without hitting anything." (OMSJ Exhibit 7 P9, 11.)

Second, Plaintiff's statements in his affidavit are unreliable based on his previous deposition testimony. Three diagrams are attached to Plaintiff's self serving affidavit. Diagram 42 purports to designate where Agent Horan was allegedly standing during the firing of the first four shots and the position of Plaintiff's vehicle when each shot was fired. (OMSJ, Exh. 7, Diagram; 2.) The diagram is inconsistent with Plaintiff's sworn deposition testimony that he did not see the person shooting at him until after the shot. (Reply, Exh. 4, p. 105-107.) It is also significant that when deposed Mason indicated that he could not identify who in fact fired the initial shots. Mason stated, "When I come to a complete stop, looked out my window, I saw the person drawn and shooting at me. I assume it was him because he admitted to it in his reports. I can't say who shot at me, but if this gentleman says he was Horan; there was another person I guess back here aiming like that at me. That's all I caught out of my quick look out the window before I left the area." (Reply, Exh. 4, p. 107.) It is unbelievable that between the time of his deposition and the writing of the affidavit the Plaintiff had the ability to recall the position of Agent Horan when each shot was fired.

Similarly, it is noteworthy that a contradictory assertion made by the Plaintiff at his deposition (not mentioned in Plaintiff's Opposition) would, if true, negate his guilt (and plea) as to the assault of Sgt. Dannels. When deposed Mason testified, "I don't believe [Sgt. Dannels] was behind my vehicle My

belief is he came out of the trailer, went over there and fell over the fence into the cactus. That's my belief. He was never back here because I never saw him." (Reply, Exh. 4, p. 133) In the written plea, Mason admitted, "I drove my the truck in reverse at a high rate of speed directly toward another law enforcement officer (Sgt. Mark Dannels)." (Reply, Exh. 1, p.5.) Plaintiff should be judicially estopped from taking inconsistent factual and legal positions to satisfy for his own personal gain. The doctrine of judicial estoppel is intended to protect against a litigant playing fast and loose with the courts, gaining an advantage by taking one position, then seeking to gain a second advantage by taking an incompatible position. *Bradley v. Harcourt*, 104 F.3d 267, 272 (9th Cir. 1996). A court need not give Plaintiff credibility where Plaintiff provides two inconsistent factual allegations. *Bradley*, 104 F.3d at 271-72. Therefore, Plaintiff's inconsistent and self serving statements should be given no credence by this court.

The Affidavit of Michael Levine

Plaintiff also attempts to create genuine issues of fact with the alleged affidavit of Michael Levine. (OMSJ p.3-5, 7, 11, 13; CSOF ¶ 16 - 22.) Defendants have filed motions asking this court to preclude the use of his affidavit and expert reports. (Motion to Preclude; Defendant's Reply to Plaintiff's Response to Motion to Preclude; Motion to Strike Unsigned, Unsworn Levine Affidavit and Expert Report.) The Defendants incorporate the arguments made in those pleadings by this reference. As argued in the Motion to Strike Unsigned, Unsworn Levine Affidavit and the Motion to Preclude, the affidavit of Michael Levine should be struck because: (1) the affidavit is unsigned; (2) Levine is not a qualified expert on the

use of force; (3) his opinions are speculative and premised on credibility assessments that only the trier of fact can make; and (4) his affidavit asserts facts that are otherwise unsupported by the record. Specifically, although Levine allegedly concludes that Horan's actions violated some "DEA Manuals, SOPS, Accepted Law Enforcement Norms," Levine fails to cite which alleged DEA Manuals, SOPS or accepted law enforcement norms he relied on in forming his opinion and the alleged documents are not part of the record. (CMSJ, Exh. 6, p.4.) The Ninth Circuit has held that an expert report cannot be used to prove the existence of facts set forth therein. *Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999) Thus, Levine's opinions that certain policies were violated is not supported by the record. Moreover, there is nothing to indicate that the policies relied upon are even relevant to this litigation. *See Scott v. Henreich*, 30 F.3d 912, 915-916 (9th Cir. 1994)

In addition, like Plaintiff, the alleged affidavit by expert Levine also ignores the written and oral factual basis for the plea agreement. For example, in the affidavit, Levine states that at page 83, line 25 of Horan's deposition, "Horan now introduces a new variation of the alleged assault, making it two separate acts, an 'elbow' followed by a 'push'. Deception.". (Motion to Strike Unsigned, Unsworn Levine Affidavit and Expert Report, Exhibit I p. 45.) This finding ignores Plaintiff's admission in the written plea agreement that he knocked Horan backwards when Horan tried to prevent him from getting into the truck and that once in the truck he attempted to push Horan out of the truck. (Exh. 1, p.5.) Further it again demonstrates that the opinions of Levine are unreliable and therefore not helpful to the court as

required by Rule 702, Federal Rules of Evidence.

Additional Inadmissable Evidence

Summary judgment rulings must be based on admissible evidence. *Turner v. Scott*, 119 F.3d 425, 430 (6th Cir. 1996). In his Opposition, Plaintiff relies on answers to improper deposition questions to which valid objections were made. For instance, at Defendant Horan's deposition, Agent Horan was asked a series of hypothetical questions. Even though under Rule 701, Federal Rules of Evidence, lay witnesses may give opinion testimony which is rationally based on the perception of the witness and is helpful to a clear understanding of the witness's testimony, they can not be required to answer hypothetical questions. *Wilburn v. Maristrans GP Inc.*, 130 F.3d 350, 356 (3rd Cir. 1998.) In his Opposition, Plaintiff argues that Agent Horan's answer to a hypothetical question is evidence that he was improperly trained in the use of force. (OMSJ p.4; CSOF ¶22.) The question and answer read as follows:

Q:.... The guy pointed a gun at you. This time he doesn't put it in the holster but throws it on the ground at your feet, puts his hands in the air, turns his back and runs away from you. Are you justified in using deadly force?

Ms. Martin: Objection; improper hypothetical.

Mr. LaMar: Join.

A. BY THE WITNESS: I might be justified but I wouldn't.

(SOF DH p. 14.) Clearly this testimony is inadmissible because Agent Horan is not an expert witness under Rule 702 Fed. R. Evid. and the question asked of him was not based on his own perception of the facts in the case. Moreover, it is undisputed that Plaintiff did not endanger Agent Horan and Sgt. Dannels with a

gun. Instead, he used his GMC pickup truck like a deadly weapon, and he did not rid himself of that weapon until he pulled over to confront the officers along the frontage road. (SOF 53 - 54.) Thus, the hypothetical is inadmissable for the additional reason that it is irrelevant.

Mischaracterizations of the Record

Plaintiff's Opposition to Summary Judgment and Controverted Statement of Facts contain numerous mischaracterizations of the record. A close review of the record demonstrates that the facts alleged by Plaintiff do not exist or are not relevant. For example, Plaintiff misstates the record when he alleges that Agent Horan stated that at the time Plaintiff was at the trailer, Agent Horan did not have have sufficient information to arrest him or even a reasonable suspicion to detain him. (OMSJ p.2.; CSOF 2.) When Agent Horan's deposition transcript is read in context, it is clear that Agent Horan was commenting on whether he had probable cause to arrest or detain Mason prior to Plaintiff's arrival at the trailer. (Reply, Exh. 5, p.43 - 45; p.47-48.) In fact, Agent Horan qualified his answers regarding probable cause and reasonable suspicion at two points. First, he noted that he was being asked a hypothetical question. He stated, "If that was the sole nature of the contact, if there were no observations on my part. Again, this a hypothetical situation." (Reply, Exh. 5, p. 45.)[2/]

[2/] A similar question was posed to Agent Townsend. Plaintiff's counsel asked, "As an officer, can you, you know -- apparently somebody said, "We want to talk to you," and he says he...(continued) Second, he clarified the time frame by asking, "Before he comes to the property? Before he's on the

property?" (Exh. 5, p. 48.) In addition, the answer is of no moment because Mason was not detained until after he left the trailer. Finally, Horan's alleged subjective beliefs are not at issue because the only issue in a *Bivens* case is whether a reasonable officer could have believed the conduct was lawful. *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997).

Plaintiff also mischaracterizes the record when he asserts that Sgt. Dannels heard the "first shots" when he was in the cactus (OMSJ p. 2; CSOF ¶ 16), implying that the first shots heard were the first shots fired by Agent Horan. The evidence does not support this inference. At deposition, Sgt. Dannels was asked, "By the time you hit the cactus, had you heard any gunshots?" He answered, "I don't recall if I had or hadn't. The reason I say that, I wasn't even thinking about that, I was thinking -- in fear of my own life right there . He was going to hit me." (Exh. 6, p. 106.) Plaintiff's counsel even clarified this point when he asked, "I guess what you're saying, you don't know, if you heard one prior to that, prior to hitting the cactus." Sgt. Dannels replied, "Yes" to counsel's question. (Reply, Exh. 6, p. 106.) In fact, Sgt. Dannels testified that he had no recollection of how many shots were fired. (Reply, Exh. 6, p. 113.)

Plaintiff, in his Opposition, also implies that Sgt. Dannels did not appear to be moving concrete blocks into the driveway. (OMSJ p. 2) In fact, in paragraph

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doesn't want to talk to you. Do you have the authority or power to make him stop and talk to you at that point?" (Reply, Exh. 7, p. 3 1.)

15 of the Controverted Statement of Facts, Plaintiff alleges: "... Dannels stated that he was not intending

to throw anything in the driveway." (CSOF ¶15.) The record clearly contradicts Plaintiff's allegation, stating:

Q. Now, prior to his going to the end and gunning back, were there cinder blocks down here that you had grabbed any of?

A. Yes.

Q. What was the purpose in grabbing these cinder blocks?

A. Well, I was going to put some here and stop him from going out. The truck was too big to stop with anything.

Q. While he is still back in the area of the trailer, you're going over near the gate to grab the cinder blocks; is that correct?

A. Right.

Q. You're bending over and picking up these blocks, I assume?

A. One. I did one, and then I realized it was fruitless.

(Reply, Exh. 6, 164-165.)

Plaintiff claims that Agent Townsend's testimony raises a material issue of fact as to whether the last shots fired by Agent Horan were necessary. (OMSJ p.3, CSOF P 17.) Again the record does not support such a conclusion. Agent Townsend testified that he saw Agent Horan shoot three shots at Plaintiff when his truck was going in reverse and that he was unaware of how many shots were fired at the truck as it headed to the road because "I went into the trailer." (Reply, Exh. 7, p. 71-72.) When asked if there was any danger to Horan or Dannels when the truck headed towards the highway, Townsend stated, I don't know. I didn't see any." (Reply, Exh. 7, p.73.) He couldn't see any because he was in the trailer at the time the truck was going forward. Thus, his testimony does not

create an issue of material fact.

Background Information Regarding Mason

Prior to the shooting Agent Horan had background information regarding the Plaintiff. (SOF ¶¶ 8, 10-19, 21.) Plaintiff disputes the truth of this information mostly through his self serving affidavit (OMSJ p.2; CSOF ¶¶ 2-7.); however, Plaintiff does not provide any evidence that the information was not in fact provided to Agent Horan or that Agent Horan unreasonably relied on the information provided to him, whether it was true or not. Thus, Plaintiff's assertions as to the truth of the information are irrelevant and do not create a genuine issue of fact. The information, whether true or not, goes to Agent Horan's state of mind.

Plaintiff also argues that Sgt. Dannels did not tell Agent Horan that Plaintiff had a history of combating police. (CSOF ¶8.) Again this is an assertion not supported by the record. In his written report, Sgt. Dannels states, "I had warned Agent Horan and Det. Townsend Mr. Mason had been very aggressive toward law enforcement in the past and to be cautious." (Reply, Exh. 2, p. 1.) Similarly, Agent Townsend wrote in his statement, "Sgt. Dannels stated for S/A Horan and I to be careful since this subject just got out of prison and was very combative with officers in the past." (Reply, Exh. 3, p. 1.)

Finally, Plaintiff asserts there is an issue of fact as to whether he was reaching under the seat of his truck. In support, he notes that Sgt. Dannels and Agent Townsend did not mention this fact during their depositions. (OMSJ, p. 3.) Plaintiff has the burden of coming of presenting admissible evidence which would raise an issue of material fact. The fact that Plaintiff did not ask either Sgt. Dannels or Agent

Townsend at deposition about Plaintiff's reaching under his seat is not controverting evidence that this event did not in fact occur. The evidence presented by Defendants as to this fact is unrefuted.

2. Legal Arguments

Mason's Arrest

In his Opposition, Plaintiff citing his self serving affidavit, describes his arrest much differently then alleged by Defendants. (OSMJ p. 6-7.) He concludes that Defendant Horan's striking him in the face was use of "deadly force under any criteria". (OSMJ p. 5.) This factual scenario, however, was not included in the Plaintiff's Complaint as a cause of action. Although Plaintiff attempted to amend his complaint to include this alleged act, the Court did not allow the amendment. Therefore, Plaintiff's arguments and assertions as to this claim are irrelevant and cannot raise a material issue of fact.

Count I

Plaintiff argues that the two felonies he committed were, "after the unjustified and unlawful attempt to detain [him] without reasonable suspicion." In support Plaintiff relies upon the mischaracterized testimony of Agent Horan, Townsend, and his own self serving affidavit. For the reasons stated above, this court should disregard these misrepresentations and unsupported assertions. This type of evidence does not create a genuine issue of fact. Moreover, this court may take judicial notice of the fact that on December 14, 1999, Plaintiff was convicted and sentenced based on his admission to facts which are contrary to those that he asserts now. As part of his plea agreement, he agreed to waive his right to appeal his sentence. (Reply, Exh. 1.) Because the allegations he now

asserts in Count one would necessarily imply the invalidity of his conviction and sentence, this court should dismiss this count. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

Count 2

For similar reasons, Plaintiff fails to raise an issue of disputed fact which would prevent entry of summary judgment on the excessive force claim. His arguments are premised on the use of: his self serving affidavit, which in many important respects, contradicts the factual basis of his plea agreement; inadmissible evidence; the affidavit of an unqualified expert, whose testimony goes beyond the scope allowed; and gross mischaraterizations of the evidence. This type of evidence cannot legally create a genuine issue of fact. Moreover, Plaintiff concedes he must show that the law governing the official's conduct was clearly established (OMSJ p.8), buts he fails to cite even one case which would demonstrate that using deadly force under the circumstances presented by the admissible and supported facts in the case at bar was clearly unlawful. (OMSJ p. 9.)

3. Conclusion

Plaintiff raises many facts, which if true, might raise a disputed issue of material fact. However, the facts relied upon by Plaintiff are not supported by the record or any other admissible or reliable evidence and thus, must be disregarded by the Court. Plaintiff's legal arguments are premised on these same unsupported facts and thus, are equally unpersuasive.

Defendants have met their burden of proof as required by Rule 56, Federal Rules of Civil Procedure. Defendants have provided pleadings, depositions and

exhibits to depositions, which demonstrate that there is no genuine issue of fact as to Agent Horan's belief that the use of force was reasonable under the undisputed factual circumstances. Plaintiff has failed to provide any admissible evidence to raise a disputed fact. Plaintiff has failed to make any showing that Agent Horan violated any clearly established Fourth Amendment rights under the factual scenario presented by the record. For all of these reasons, Defendant Horan is entitled to qualified immunity. Accordingly, the Defendants request that this Court enter summary judgment in their favor.

Respectfully submitted this 3rd day of January, 2000.

JOSÉ de JESUS RIVERA
United States Attorney
District of Arizona

JANET MARTIN
Assistant U.S. Attorney

Original filed and copy of the foregoing
mailed this 3rd day of January, 2000 to:

Vernon E. Peltz
7925 N. Oracle Rd, #351
Tucson, AZ 85704-6316
Attorney for Plaintiff

APPENDIX M

IN THE UNITED STATES FEDERAL DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, v. DAVID HORAN, Agent, United States Drug Enforcement Agency, et al, Defendants.	**NO. CIV 99-00015 TUC JMR** **MOTION FOR DISQUALIFICATION** (Assigned to J. Roll)

COMES NOW the Plaintiff, DANNY MASON, by and through his counsel undersigned, and hereby moves the Court to recuse itself, pursuant to 28 U.S.C. §§144 and 455. The Plaintiff's position is more fully set forth in the following Memorandum.

Respectfully submitted this 22nd day of December, 1999.

Vernon E. Peltz, Attorney for Plaintiff

Copy of the foregoing mailed this _____ day of December, 1999, to:

Janet Martin
Assistant U. S. Attorney
110 S. Church Avenue, Suite 8310
Tucson, AZ 85701

MEMORANDUM OF POINTS AND AUTHORITIES
FACTS

On or about February 13, 1998 three officers were involved in an incident with Mr. Mason. The officers were attempting to detain Mr. Mason to talk to him. He did not want to talk to the officers and he wanted to leave. Nine shoots were fired by one of the officers and one of the bullets struck Mr. Mason in the back.

One of the key issues in this case is whether or not the officer's conduct was justified, and whether he had any reasonable suspicion to detain Mr. Mason. Another issue is whether the shooting was an excessive use of deadly force.

After the incident was over Mr. Mason was arrested for various criminal charges, including assault on an officer. Mr. Mason pled to assaulting an officer and he was sentenced on December 14, 1999 before the Honorable Judge Roll. During that sentencing, the Judge made comments indicating that he had decided those issues in favor of the officer and against Mr. Mason.

Furthermore, the court has read and reviewed the pre-sentence report. One of the allegations in that report was that Mr. Mason "confessed" to two federal officers after the incident.

The affidavit submitted with this motion does not contain a statement of the judge's exact words because a transcript has not yet been prepared. The transcript will be submitted as soon as it has been prepared.

DISQUALIFICATION PURSUANT TO 28 U.S.C.§ 455(a)

28 U.S.C. § 455 provides in pertinent part that

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

The Judge's comments during the sentencing of Danny Mason confirms that his impartiality in the instant case could certainly be questioned. The Judge's comments demonstrate that he has made a decision on the key issues in this case; namely, whether the officer's were justified in attempting to detain Mr. Mason, and whether shooting Mr. Mason was an excessive use of force. The comments also disclose a personal bias against the Plaintiff, Danny Mason.

In the 9th Circuit facts alleging impartiality are sufficient if a reasonable person with knowledge of all the facts would conclude that impartiality might reasonably questioned. *Ronwin v. State Bar,* 686 F.2d 692, 700 (9th Cir. 1981). In the instant case, any reasonable person who knew the issues in the civil case, and who heard the Judge's comments would conclude that the judge had already made up his mind, and he was not impartial.

In *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L. Ed. 2d 474 (1994 the court stated that,

Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep seated favoritism or

antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540 at 555.

Since the opinions formed by the judge were not on the basis of facts introduced or events occurring in the course of the current proceedings, there is no need to show a deep seated favoritism or antagonism. However, the fact that the judge in this proceeding expressed an opinion in the plaintiff's criminal proceeding that resolved the key issues is this proceeding does violate due process.

Therefore, the court should disqualify itself pursuant to 28 U.S.C. §455(a)

DISQUALIFICATION PURSUANT TO 28 U.S.C § 144

28 U.S.C § 144 provides in pertinent part that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, ... A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that is made in good faith.

In the instant case based on the affidavit filed herein, it is evident that the court has already decided the only issues in the instant case, and has decided them in favor of the defendants and against the plaintiff. The court is obligated to review the sufficiency of the affidavit, a review that is restricted to its legal sufficiency and does not include the truth of the allegations. However, in this instance, the

truthfulness of the affidavit could be decided upon the transcript.

And as stated regarding a disqualification pursuant to Section 455, since the opinions were expressed, not in this proceeding, but in a criminal proceeding, the extrajudicial source factor has been met.

Therefore, the court should disqualify itself pursuant to 28 U.S.C. §144.

Respectfully submitted this 22nd day of December, 1999.

_____

Vernon E. Peltz, Attorney for Plaintiff

CERTIFICATE OF MAILING

Copy of the foregoing mailed this _____ day of December, 1999, to:

Janet Martin
Assistant U. S. Attorney
110 S. Church Avenue, Suite 8310
Tucson, AZ 85701

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DANNY A. MASON Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	)))))))	No. CV 99-15 TUC JMR ORDER

Pending before the Court is Plaintiff's Motion for Disqualification. For the reasons stated below, Plaintiff's motion is denied.

Background

On March 1, 1999, in a related criminal case, Plaintiff entered a plea of guilty to violating 18 U.S.C. § 111(a)(b), Assault on a Federal Officer. The plea agreement was filed on March 5, 1999. On December 14, 1999, the Court sentenced petitioner to 57 months imprisonment and 36 months supervised release. According to the affidavit of Jonne Kohler, the Court expressed its belief that Agent Horan, Agent Townsend, and Officer Dannels were "justified in their conduct and were justified in shooting Mr. Mason." (Affidavit of Jonne Kohler, at 1-2).[1]

Thereafter, on December 22, 1999, Plaintiff filed a

[1]For the purposes of establishing the legal sufficiency of the affidavit, courts must accept the specific factual allegations of the affidavit as true. *See United States v. Sibla*, 624 F.2d 854, 867 (9th Cir.

1980).

Motion for Disqualification. He requests that the Court recuse itself pursuant to 28 U.S.C. §§ 144 and 455.

Discussion

Plaintiff seeks recusal under 28 U.S.C. §§ 144 and 455. Section 144 states in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.[2]

The tests for determining judicial bias are the same for sections 144 and 455. *See United States v. Sibla*, 624 F.2d 864, 867 (9th Cir, 1980). Section 455 provides in pertinent part:

> (a) Any ... judge ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) where he has a personal bias or prejudice concerning a party, orpersonal knowledge of disputed evidentiary facts concerning the proceeding.

"To demonstrate judicial bias, [the movant] must show that the source of the alleged bias is extra-judicial, or that the evidence of bias is pervasive." *Miller v. Commodities Futures Trading Comm.*, F.3d,

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[2]It is clear that the Court may decide whether recusal is appropriate. *See Sibla*, 624 F.2d at 866. Only if the Court determines that the accompanying affidavit specifically alleges facts sufficient to require recusal is the motion referred to another judge. *Id.*

1999 WL 1210917, *8 (9th Cir. Dec. 20, 1999). The Supreme Court has stated that opinions expressed by a judge that are not derived from an extrajudicial source "do not constitute a basis for a bias or partiality motion unless they a deep seated favoritism or antagonism that would make fair judgment impossible." *Liteky v United States*, 510 U.S. 540, 555 (1994).

The core of Plaintiff's argument is that the Court's statements at his sentencing revealed that it had already made a determination as to the central issue of this civil action. Because the focus of the civil action is the reasonableness of the officers' actions, Plaintiff argues that the Court's statements at sentencing that the officers were justified in using deadly force would cause "any reasonable person who knew the issues in the civil case, and who heard the Judge's comments would conclude that the judge had already made up his mind." (Motion for Disqualification, at 3). Plaintiff also seems to argue that the Court obtained prejudicial information from the Presentence Report.

The Court's statements were made in the context of Plaintiff's sentencing, a related judicial proceeding. Moreover, Plaintiff does not argue that there was any impropriety, bias, or misconduct related to the sentencing itself. Therefore, the preliminary issue is whether information obtained and opinions expressed in a different, but related, judicial proceeding are "extrajudicial." Although the Supreme Court apparently declined to clarify whether a court's actions in a prior proceeding are "extrajudicial," it noted that "many, perhaps most, Courts of Appeals considered knowledge (and the resulting attitudes) that a judge properly acquired in an earlier proceeding

not to be 'extrajudicial.'" *Liteky*, 510 U.S. at 544. *See also Lyons v. United States*, 325 F.2d 370, 376 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964), *In re Corrugated Container Antitrust Litigation*, 614 F. 2d 958, 964 (5th Cir. 1980) (judge's rulings in criminal case did not require that he recuse himself from related civil case), *cert. denied*, 449 U.S. 888 (1980); *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971) (recusal unnecessary because "the bias or prejudice alleged did not stem from an extrajudicial source, but rather from what the judge learned in his judicial capacity"). Moreover, in *United States v. $292,888.04 in U.S. Currency*, the Ninth Circuit ruled that a district judge was not required to recuse himself from a civil forfeiture proceeding by virtue of the fact that he also presided over the claimant's criminal proceedings. 54 F.3d 564 (9th Cir. 1995). Therefore, Plaintiff's affidavit has failed to show the Court has demonstrated bias or prejudice resulting from an extrajudicial source.

Because Plaintiff has failed to demonstrate bias or prejudice from an extrajudicial source, he must demonstrate a pattern of bias or "a deep seated favoritism or antagonism." Plaintiff has failed to offer any examples of a pattern or favoritism, and the Court's review of the record provides no support for such a proposition. Issues of fairness are not raised merely because the Court learned about the event underlying this action from a related proceeding. *See Clifford v. United States*, 136 F.3d 144, 148 (D.C. Cir. 1998). *See also United States v. Gelb*, 783 F. Supp. 748, 758 (E.D.N.Y. 1991) (recusal not warranted because "all that the Court knows about this case or the persons involved herein has been acquired in proceedings properly before it in this and the related

criminal case"). Nor does the fact that the Court expressed its opinion regarding facts relevant to the sentencing and to this civil action demonstrate that the Court must recuse itself. "Judges are presumed to be able to compartmentalize the information they receive and only rely on evidence relevant for a particular decision." *Clifford*, 136 F.3d at 148. Therefore, there is no basis for recusal under sections 144 or 544.

Accordingly, IT IS ORDERED that Plaintiff's Motion for Disqualification is DENIED.

DATED this 7th day of January, 2000.

JOHN M. ROLL
United States District Judge

APPENDIX O

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Danny A. Mason, a single man, Plaintiff, (v) United States, et al, Defendants.	))))))	CIV-99-15 TUC JMR DEFENDANTS' HORAN MOTION FOR RECONSIDERATION

Defendants David Horan and Jane Doe Horan, pursuant to Rule 59 (e) Fed.R.Civ.P., hereby move for reconsideration of this Court's order denying summary judgement of the Plaintiff's excessive force claim.

On April 14, 2000, this Court denied Defendant Horan's motion for summary judgment on the Fourth Amendment excessive force claim. Although the Court noted that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer, the Court concluded there was a genuine issue of material fact as to whether a reasonable officer would have believed that Plaintiff continued to pose a threat to Sgt. Dannels at the time he was shot. (Order at 10-11.) In support, the Court wrote that Agent Horan's position is that he began firing at Plaintiff as he was driving his car towards Sgt. Dannels and continued firing at Plaintiff "after he had driven the truck out of Barnard's driveway because he felt Dannels safety was still in danger."[1/]

[1/]It is not Agent Horan's position that...(continued)

The Court then cited Plaintiff's deposition testimony and affidavit that Agent Horan began firing at him as he was "driving away" and that he was hit by the last shot fired as he was "leaving the area."

As the Court noted: "An officer's use of deadly force is reasonable if he 'has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Tennessee v. Garner*, 471 US. 1, 3 (1985). Applying this law to the present case, even assuming the facts asserted by Mason to be true for purposes of this Motion, Defendant respectfully submits that Agent Horan is entitled to qualified immunity.

It appears that the Court found a disputed material fact in Plaintiff's assertion that he was leaving or retreating. Under applicable law, ever, Plaintiff's subjective belief that he was intending to leave (whether true or false) is not relevant to the determination of whether Agent Horan is entitled to

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he fired until the truck was out of Barnard's driveway. Agent Horan designated the position of Plaintiff's vehicle when the last shot was fired by marking a circle with an "x" in its center on DSOF Exhibit 5. This mark is much closer to Sgt. Dannels than Central Avenue. (DSOF Exhibit 1 p. 111). Although Horan's description of Plaintiff's location when he fired the last shot is different than Plaintiff's description that he was hit with the last round as he "approached onto Central Avenue" (DSOF Exhibit 7 p. 123), it does not prevent the entry of summary judgment. For reasons discussed more fully below, the discrepancy does not create a material issue of fact because the use of force was objectively reasonable even if the court presumes the disputed facts in favor of Plaintiff.

qualified immunity. Rather, as the Court noted, the officer's actions must be evaluated under an objective standard. *Graham v. Connor*, 490 U.S. 386, 397, (1989); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *Scott v. Henrich*, 39 F.3d 912 914 (9th Cir. 1994). Thus, the only relevant inquiry is whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting the officer. *Graham*, 489 U.S. at 1362.

Even assuming the disputed relevant facts regarding the shooting in favor of the Mason, Agent Horan is entitled to qualified immunity. Mason describes himself as "leaving" when the first shots were fired. Even if Mason's subjective was to leave, Mason's descriptions and drawing of his actions coupled with the undisputed facts demonstrate that a reasonable officer could not have reasonably predicted Plaintiff's subjective intent based upon his objective actions. (Plaintiff's Statement of Controverted Facts ("PSCF"), Exhibit 7, Diagrams 1,2 &3.) Plaintiff was not behaving rationally. He posed an immediate threat of serious harm up until the last shot was fired due to the lack of predictability.

It is undisputed that Plaintiff did not simply back his truck out of the driveway to the main street. In Plaintiff's Diagram 1, Plaintiff shows that his truck was parked in front of Barnard's trailer. (PSCF Exhibit 7, Diagram 1.) He got in his truck and first backed up his truck at a slight southwesterly angle from the position it was parked in to a position labeled "S-1", near the DEA car, and stopped. (PSCF Exhibit, Diagram 1.) Then he drove his truck forward towards the east, past his initial parking place, and stopped at the position labeled "S-2." (*Id.*)

Meanwhile, Sgt. Dannels went to the opposite end

of the lot and attempted to place cinder blocks in the driveway to prevent Plaintiff's escape. (DSOF ¶ 38.) When Sgt. Dannels looked toward Plaintiff he saw him turned around and looking through the rear window of the cab towards Sgt. Dannels. (DSOF ¶¶ 38,39.) Seeing him stopped, Dannels took a few steps towards the truck thinking Plaintiff was ready to give up. (DSOF ¶ 39.) Plaintiff did not give up. Instead, Plaintiff revved his engine, and accelerated the truck in reverse toward Dannels. (DSOF ¶ 39.)

Plaintiff drove the truck in reverse in a westward direction, part way out of the driveway, past the fence. Instead of backing all the way out of the driveway onto the main road (Central Avenue), once he passed the fence, he drove the truck in an arc-like pattern circling Sgt. Dannels who was impaled on the cactus north of the fence opening in a large dirt lot that fronts the property . (PCSF Exhibit 7, Diagram 1). (The size of this dirt lot area is most easily seen on DSOF Exhibit 5.) Sgt. Dannels, in an attempt to avoid being hit had jumped over the fence and landed in a cactus on the other side. (DSOF ¶ 39.) There was no need for Plaintiff to drive in the arc-pattern if he merely intended to leave the premises. As noted in the Court's Order, Plaintiff admitted in his guilty plea that he recklessly assaulted Sgt. Dannels with his truck.[2/]

[2/]After the fact, at his plea hearing, Plaintiff characterized his assault on Sgt. Dannels as merely reckless. It cannot be disputed, however, that a reasonable officer at the scene would have believed that the assault was intentional and would have continuing concerns for Sgt. Dannels' safety as long as Plaintiff was close enough to strike Dannels' with his truck.

In Diagram #2, Plaintiff indicates that the first four shots were fired as he drove in the arc-pattern circling the area where Sgt. Dannels lay on the ground. (PCSF Exhibit 7, Diagram 2.) At this point, Plaintiff still had not objectively demonstrated an intent to leave the scene. Although he had been shot at four times, Plaintiff did not turn off his truck and surrender. Rather, at the end of the arc, Plaintiff, for the third time, came to a complete stop, as Plaintiff indicated on his Diagram as "S-3". (PCSF Exhibit 7, Diagram 1.) When he stopped, he made eye contact with Sgt. Dannels who was on the ground. Plaintiff testified: "I looked out the window after the fourth shot after I had come to a complete stop. This all happened pretty fast. When this all started, I stopped, looked out the window to see what was going on. And here's a guy standing there with his gun drawn and somebody behind him that had their gun out, and I didn't know who. There's Sergeant Dannels laying on the ground covering his head like he was being shot at." (PSCF, Exhibit 5, p. 103-04). When asked if he and Sgt. Dannels had made direct eye contact during the stop, Plaintiff acknowledged: "Yeah, I did. We made eye contact, and he was looking at me like I was looking at him, like what the heck is going on." (Reconsideration Exhibit 1.) Sgt. Dannels described it as follows, "Mr. Mason stops right here. The engine is revving up. I'm looking directly at him through the driver's door, and he is looking a directly at me. I'm thinking, 'What are you doing? Why don't you leave?' I was kind of locked -- I was stuck on the cactus. I'm like, 'This guy is going to run me over. He's going to do it again.' I was in fear big time." (DSOF 45-46, Exhibit 4 p. 146.)

The Court's conclusion that there is a material

issue of fact regarding the officers' concern for Sgt. Dannel's safety appears to be centered on the final sequence of shots. Reviewing Plaintiff's action under the reasonable officer standard, Defendant respectfully submits that he was entitled as a matter of law to qualified immunity for firing these final shots as there was still no indication that the officers were safe from Plaintiff and his erratic driving.

In Diagram #3, Plaintiff designates the position of his truck during the last five alleged shots. As noted above, just before the last shots were fired, Plaintiff had brought his truck to a stop in the large dirt area between the fence and Central Avenue. As is most easily seen on DSOF Exhibit 5, the dirt area was large enough such that the Plaintiff could maneuver his truck in many positions. At this point, the officers were aware that although Plaintiff had brought his truck to a stop on three previous occasions, he had not surrendered. Officer Dannels' mistaken earlier belief that Plaintiff was surrendering resulted in his almost being run over.

From the third stop in the large dirt area, Plaintiff again put his truck in forward. As noted in Plaintiff's testimony above, by this time, Agent Horan had positioned himself in a protective stance between Plaintiff's truck and Sgt. Dannels. (See also DSOF ¶ 47.) Plaintiff indicates in his diagram that he then started driving at a slight angle in the large dirt area, a southwesterly position from the third stop. He did not go directly to the driveway. This is after he had been shot at four times. Even then, Plaintiff did not race out of the area. Rather the truck was moving slowly. (DSOF ¶ 48.) The truck rapidly accelerated only after the last shot was fired. (DSOF Exhibit 1, p. 112.)

There is no testimony or evidence that Plaintiff had driven his truck onto Central Avenue at the time he was shot at or struck. Defendant Horan testified that he fired at Plaintiff until he left the Barnard's driveway. He did not testify that he shot "after [Plaintiff] had driven out of Barnard's driveway." At deposition Agent Horan testified that when he fired the last shot at Mason's truck, the truck was twenty-five feet from Sgt. Dannels. He was asked:

Q: Mark the green spot where the truck was when you fired your last round.

A: Just beginning to make the corner here.

Q: How far away would you say that truck was from Officer Dannels when you fired that last shot?

A: I would have to say at least 25 feet.

Q: At least 25 feet?

A: Uh-huh.

Q: Still moving in a forward - still moving away?

A: Well, he was moving slowly, and he had turned around to look, but after I had fired my last shot is when he rapidly accelerated.

(DSOF ¶¶ 48, 49; Exhibit 1 p. 109-112.)

Even Plaintiff concedes that the last round hit him before he entered onto Central Avenue. (DSOF Exhibit 7, p. 123.) Plaintiff acknowledged that he was still in front of the residence when he was hit. (DSOF Exhibit 7 p. 123.) Central Avenue is approximately 200 feet from the cactus. (DSOF ¶ 144.)

As noted above, in the dirt area in front of the residence, Plaintiff had plenty of room to maneuver his truck again at the officers if he so desired. (DSOF Exhibit 4 p. 167.)

Due to Plaintiff's erratic behavior, the officers could not have reasonably predicted that Plaintiff was leaving or that he no longer posed a threat to the

officers' safety. A reasonable officer would not have known at the point the last shots were fired (before Plaintiff drove on to Central Avenue) that Plaintiff was actually leaving - assuming that he was. Maybe he was still considering his options and only left because he had been shot. The officers' inability to predict Plaintiff's intent is buttressed by the fact that the officers had knowledge of Plaintiff's involvement and use of methamphetamine. (DSOF ¶¶ 8, 10, 11, 12, 13, 14, 16, 17, 18, 27, 29, 32, 39, 40.) Individuals under the influence of methamphetamine often act erratic, irrational and aggressive and it is virtually impossible to predict the behavior of an erratic and irrational person. (DSOF ¶ 29.) *See Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994) (from the vantage of an officer whose life is jeopardized, confronting a violent and erratic suspect, "a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression and death").

Conclusion

It is only in hindsight that it could be believed that Plaintiff was no longer a threat to the officers and was intending to leave when he was shot at before he drove his truck onto Central Avenue. Under the totality of the circumstances, until Plaintiff had fully committed to leave the area, by driving his truck onto the main road, no reasonable officer would know or be able to predict whether Plaintiff was intending to leave after his second stop or his third stop or whether he intended to again redirect his truck at the officers. The officers had observed Plaintiff's erratic driving, stopping and starting, switching his vehicle from forward into reverse, changing his speed, and driving at an officer. The officers had knowledge that Plaintiff

was associated with and had used methamphetamine. Plaintiff's characterization of his actions as leaving is subjective. Under the objective standard, Agent Horan would have been justified to shoot at Plaintiff until he drove the truck onto Central Avenue. Therefore, even assuming the Plaintiff's facts as true for purposes of Defendant's Motion, Agent Horan is entitled to summary judgment on the issue of qualified immunity as a matter of law. Accordingly, Defendants respectfully request that the Court reconsider its denial of summary judgment on the excessive force claim, and enter summary judgment in Defendants' favor.

Dated this 1st day of May, 2000.

JOSÉ de JESUS RIVERA
United States Attorney
District of Arizona

JANET K. MARTIN
Assistant U.S. Attorney

Original filed and copy of the foregoing
mailed this 1st day of May, 2000, to:
Vernon E. Peltz
7925 N. Oracle Rd, #351
Tucson, AZ 85704-6316
Attorney for Plaintiff

APPENDIX P

IN THE UNITED STATES FEDERAL DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

DANNY MASON, a single man, Plaintiff, V. DAVID HORAN, Agent, United States Drug Enforcement Agency, et al, Defendants.	NO. CIV 99-00015 TUC JMR RESPONSE TO DEFENDANT'S HORAN MOTION FOR RECONSIDERATION (Assigned to J. Roll)

COMES NOW the Plaintiff, DANNY MASON, by and through his counsel undersigned, and hereby responds to Defendant's Horan Motion for Reconsideration, as set forth in the following Memorandum of Points and Authorities.

DATED this 9th day of May, 2000.

Vernon E. Peltz
Attorney for Plaintiff

COPIES of the foregoing mailed this 9th day of May, 2000, to:
Janet K. Martin
Assistant U.S. Attorney
U.S. Attorneys Office
110 S. Church Avenue, Suite 8310
Tucson, AZ 85701
Attorney for Defendant Horan

MEMORANDUM OF POINTS AND AUTHORITIES

The state misunderstands the Court's ruling regarding the reason the Court denied the Plaintiff's Motion for Summary Judgment as to the excessive force issues.

In *Tennessee v. Garner*, 471 U.S. 1, 11, (1985) held that:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

The crux of the matter then becomes whether or not Mr. Mason was a threat to the officers or to others at the time he was shot. Horan stated that he began firing at Mason during the time that Dannels was running up the driveway to avoid being hit. Dannels testified that he heard Horan's first shots when he was in the cactus, where he would have been next to the driveway and out of danger. Dannels' statement comports with Mason's statement, and that corroboration directly controverts Horan's version of events. Agent Horan stated that when he fired the last shot, the one that hit Mason, he was still trying to eliminate the threat to Dannels and attempting to prevent Mason's escape. Agent Townsend stated that once the truck was put in forward gear and was heading toward the highway, he did not see any danger to Horan or Dannels at that point. The Plaintiff's testimony that he was shot after that time creates an issue of fact as to whether or not any danger to Dannels still existed when the last shot was

fired. Dannels stated that Horan fired at least one shot after Mason came through the gate. Finally, even in Horan's deposition he stated that, "I thought I had hit him [Mason] when he was going out." Since there are disputed facts regarding a very material issue, the Court property denied summary judgment as to the excessive force claim.

The balance of the government's argument in the motion to reconsider is merely a slightly modified re-play of the original motion with an interesting twist. The government must admit that the facts all show that the truck was leaving as the last shot was fired. This is amply demonstrated by Horan's own testimony, cited by the Government's Motion to Reconsider on top of page six, that the truck is twenty five feet from Dannels, and moving away when the last shot was fired. Since the government cannot change the fact that the truck was leaving and the Plaintiff was shot in the back, now the government argues that the Plaintiff was not leaving fast enough, and since he was unpredictable he could have intended to again redirect his truck at the officers.

The government is correct that Plaintiff's belief that he was intending to leave is not relevant. What is relevant is that he did leave, and while he was leaving, when he was no longer endangering any person; Horan shot hit him in the back. The Government wants the Court to ignore all the objective indications that the Plaintiff was leaving, because the Plaintiff was unpredictable and could have redirected his truck at the officers. Whether the officers could predict what the Plaintiff would do next is simply not relevant. After considering all the affidavits presented, this Court held that there were disputed issues of genuine fact, there are disputed issues of fact and this Court's

original determination is correct. Therefore the Government's Motion to Reconsider should be denied.

Respectfully submitted this 9th day of May, 2000.

_____

Vernon E. Peltz, Attorney for Plaintiff.

COPIES of the foregoing mailed this 9th day of May, 2000, to:
Janet K. Martin
Assistant U.S. Attorney
U.S. Attorneys Office
110 S. Church Avenue, Suite 8310
Tucson, AZ 85701
Attorney for Defendant Horan

APPENDIX Q

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Danny A. Mason, a single man, Plaintiff, v. United States, et al, Defendants.	CIV-99-15 TUC JMR DEFENDANTS' HORAN REQUEST TO REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR RECONSIDERATION

On May 1, 2000, Defendants David Horan and Jane Doe Horan filed a Motion for Reconsideration. Pursuant to Local Rule 1.10(p) no response to a Motion for Reconsideration may be filed unless ordered by the Court. On May 9, 2000, without court order, Plaintiff filed a response. In the event the Court is inclined to consider the Response, Defendants request the opportunity to reply due to mischaracterizations of the record in Plaintiff's Response.

Dated this 22nd day of May, 2000.

JOSÉ de JESUS RIVERA
United States Attorney
District of Arizona

JANET K. MARTIN
Assistant U.S. Attorney

Original filed and copy of the foregoing

mailed this 22nd day of May, 2000, to:

Vernon E. Peltz
7925 N. Oracle Rd, #351
Tucson, AZ 85704-6316
Attorney for Plaintiff

APPENDIX R

IN THE UNITED STATES DISTRICT
DISTRICT OF ARIZONA

Danny A. Mason, Plaintiff, (v) United States of America, et al., Defendants.	)))))))	No. CV 99-15 TUC JMR O R D E R

Pending before the Court is Defendant Horan's Motion for Reconsideration. For the reasons stated below, Defendant's motion is denied.

Background

On February 13, 1998, three law enforcement officers questioned Kris Barnard at her residence about her possible involvement with illegal narcotics trafficking. During the questioning, Plaintiff arrived at Ms. Barnard's residence. After discovering that the law enforcement officers wanted to talk to him, Plaintiff attempted to leave the area. When one of the officers attempted to stop him, an altercation ensued. During the altercation, Plaintiff is alleged to have intentionally driven his truck at the officers and Defendant Horan fired his sidearm at him.[1] One of the shots fired at Plaintiff struck him in the shoulder.

On January 11, 1999, Plaintiff filed a complaint against Defendant Horan alleging two *Bivens*[2] claims

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[1]In the related criminal proceeding, Plaintiff entered a plea of guilty to assaulting a federal officer.

[2]*Bivens v. Six Unknown Named*...(continued)

and two state law tort claims against the officers involved in the February 13, 1998 incident, DEA Agents Horan and Townsend and Cochise County Sheriff's officer Sgt. Dannels. Thereafter, the Court granted Defendants' unopposed motion to substitute the United States as the proper party for the state law claims.

On November 15, 1999, Defendant Horan filed a Motion for Summary Judgment regarding the remaining claims against him: 1) the *Bivens* claim for unlawful search and seizure; and 2) the *Bivens* claim for excessive force. The Court granted Defendant Horan's motion as to Plaintiff's unlawful search and seizure claim and denied Defendant Horan's motion as to Plaintiff's excessive force claim. The Court determined that there existed a genuine issue of material fact regarding the sequence of events related to the shooting. On May 1, 2000, Defendant Horan filed a Motion for Reconsideration. Thereafter, on May 10, 2000, Plaintiff filed a response.

Discussion

Defendant Horan filed his Motion to Reconsider pursuant to Fed.R.Civ.P. 59(e). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Defendant Horan has failed to provide newly discovered evidence or indicate that there has been a change in the controlling law. Moreover, a review of

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Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971).

the Court's April 17, 2000 order reveals that it did not commit "clear error."

Defendant Horan argues that the Court inappropriately relied on Plaintiff's subjective beliefs when evaluating whether Defendant Horan was protected by qualified immunity. Plaintiff responds that the Court properly found that his testimony that he was shot after leaving the scene "create[d] an issue of fact as to whether or not any danger to Dannels still existed when the last shot was fired." (Response, at 2).

Although the record may demonstrate that Defendant Horan possessed a subjective belief that his actions were justified, the issue is whether a reasonable law enforcement officer would have believed the level of force used was lawful. *See Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997). In its April 17, 2000 order, the Court found that the initial shots fired by Defendant Horan were justified. However, the Court noted that there was "a genuine issue of material fact as to whether a reasonable officer would have believed that Plaintiff continued to pose a threat to Sgt. Dannels at the time he was shot." (April 17, 2000 Order, at 11).

In his deposition, Plaintiff states that as he was driving away from the scene and had passed through the gate of Ms. Barnard's residence, Defendant Horan fired five shots at him from within the fenced area. (Exhibit 7, Affidavit of Danny Mason, at 2). Sgt. Dannels also stated that Defendant Horan fired at Plaintiff after he had left through the gate. Although these facts, even if true, do not necessarily establish that Defendant Horan employed excessive force, they do raise a dispute of material fact about the sequence of events resulting in Plaintiff's injury.

It was not, therefore, Plaintiff's subjective belief

that he was leaving which was the basis of the Court's decision to deny Defendants' summary judgment motion regarding the excessive force claim. Rather, Plaintiff ~~omitted~~ submitted evidence which raised a genuine issue of material fact as to whether Plaintiff was shot after he had left the residence and no longer posed a threat to the officers.

Accordingly,

IT IS: ORDERED that Defendant Horan's Motion for Reconsideration is DENIED.

DATED this 13 day of July, 2000.

JOHN M. ROLL
United States District Judge

APPENDIX S

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Danny A. Mason, a single man, Plaintiff, E. United States, et al., Defendants.	CV 99-015-TUC-JMR **MOTION FOR RECONSIDERATION IN LIGHT OF NEW SUPREME COURT PRECEDENT**

Defendant David Horan, by and through undersigned counsel, pursuant to Rule 59 (e) Fed.R.Civ.P., and Rule 60 (b) Fed.R.Civ.P., hereby moves for reconsideration of this Court's order denying summary judgment of the Plaintiff's excessive force claim. This Motion is supported by all matters of record.

This Motion to Reconsider is filed pursuant to Fed. R. Civ. P. 59 (e) and 60 (b). Under Rule 59 (e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law. *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). The latter condition of "an intervening change in the controlling law" is the premise upon which this motion is based.

In a recent decision, the Supreme Court reversed a Ninth Circuit decision which held that, in analyzing whether an officer is entitled to qualified immunity,

the inquiry regarding the officer's use of excessive force is identical to the question resolving the merits of the excessive force claim. *Saucier v. Katz*, 121 S.Ct. 2151 (2001). The Court held that the two questions are distinct, and that the "Ninth Circuit's approach -- to deny summary judgment if a material issue of fact remains on the excessive force claim -- could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 2153.

When considering whether qualified immunity is appropriate, the Court held that if alleged facts indicate the officer's actions violated a constitutional right, the next step is determining "whether the right was clearly established" to the appropriate level of specificity. *Id.* at 2156. The Court noted that officers face difficulty in determining how legal doctrine applies to their circumstances, and that qualified immunity serves to protect reasonable mistakes as to what the law requires. *Id.* at 2158. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 2156. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 2156-57.

The Supreme Court recognized that officers may make reasonable mistakes regarding what the law requires. The court stated:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. ... If the officer's mistake as to what the law requires is reasonable, however, the officer is

entitled to qualified immunity.

Saucier, 121 S.Ct. at 2158. The Supreme Court concluded in *Saucier* that there were no cases demonstrating a clearly established rule prohibiting the officer's actions in the case. *Id.* at 2160.

Saucier is applicable to the present case because Plaintiff has not cited and Defendant is unable to find any case law or statutes offering "clearly established standards" with regard to Agent Horan's actions. *Id.* at 2159. The courts simply have not addressed facts, where to protect the life of another, an officer firing a series of shots at an assailant in a truck on a residential lot, during which the assailant forms the intent to leave the premises in his truck and heads in the direction of the street, but the officer is not sure whether he would leave or would instead assault the victim again, continued to fire his weapon until the assailant was on the street. Due to the absence of a clear and specific legal standard that would have placed Agent Horan on notice that his actions were clearly unlawful, the Supreme Court ruling in *Saucier* requires a finding that Agent Horan's conduct is entitled to the protection of qualified immunity as a matter of law. Accordingly, Defendant Horan respectfully requests, in light of this new precedent, that this Court reconsider its denial of summary judgment on the excessive force claim, and enter summary judgment in Defendant's favor.

Respectfully submitted this 12th day of July, 2001.

PAUL K. CHARLTON
United States Attorney
District of Arizona

JANET K. MARTIN

Assistant U.S. Attorney

Original filed and copy of the foregoing
mailed this 12th day of July, 2001, to:
Vernon E. Peltz
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Tucson, AZ 85704-6316
Attorney for Plaintiff

APPENDIX T

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. DANNY ALAN MASON, Defendant.	No. CR 98-287-TUC-JMR PLEA AGREEMENT

The United States of America and the defendant agree to the following disposition of this matter:

PLEA

The defendant agrees to plead guilty to the Indictment charging the defendant with a violation of Title 18, United States Code, Sections 111(a), 111(b) and 1114, Assault on Federal Officer.

TERMS

The defendant understands that his guilty plea is conditioned upon the following terms, stipulations, and requirements:

Maximum Penalties

(a) A violation of Title 18, United States Code, Sections 111(a), 111(b) and 1114 is punishable by a maximum fine of $250,000.00, or a maximum term of imprisonment of ten (10) years, or both.

(b) Pursuant to Title 18, United States Code, Section 3561, et seq., at the sole discretion of the Court, and even if probation is available, the defendant instead may be sentenced to a term of imprisonment with three years of supervised release

to follow under §§ 5D1.1 and .2 of the Sentencing Guidelines.

(c) Pursuant to the Sentencing Guidelines issued under the Sentencing Reform Act Of 1984, the Court shall order the defendant to pay a fine unless the defendant establishes the applicability of the exceptions contained in § 5E1.2(f) of the Guidelines.

(d) Pursuant to 18 U.S.C. § 3013(a), the defendant shall pay a special assessment of $100.00 for each count to which the defendant is pleading guilty. The special assessment is due and payable at the time the defendant enters the plea of guilty, but in no event shall be paid later than the time of sentencing unless the defendant is indigent. if the defendant is indigent. If the defendant is indigent, the special assessment will be collected according to the provisions of Chapters 227 and 229 of Title 18, United States Code.

Agreements Regarding Sentence

(e) Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the government and the defendant stipulate and agree that the following is an appropriate disposition of this case:

The parties agree the defendant's sentence will be between 0 and 57 months imprisonment. The parties further agree that the defendant will receive no more than two years supervised release following any sentence of imprisonment imposed by the court. Additionally, the government agrees not to take a position at sentencing as to what it believes is the appropriate sentence.

If the Court, after reviewing this plea agreement, concludes any provision is inappropriate, it may reject the plea agreement, giving the defendant, in accordance with Fed. R. Crim. P. 11(e)(4), an opportunity to withdraw the defendant's guilty plea.

Waiver of Defenses and Appeal Rights

The defendant waives any and all motions, defenses, probable cause determinations, and objections which defendant could assert to the information or indictment or to the Court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement. Defendant further waives any right to appeal the Court's entry of judgment against him, and waives any right to appeal the imposition of sentence upon him under Title 18, United States Code, Section 3742 (sentence appeals).

Reinstatement of Prosecution

If the defendant's guilty plea is rejected, withdrawn, vacated, or reversed by any court in a later proceeding, the government will be free to prosecute the defendant for all charges as to which it has knowledge, and any charges that have been dismissed because of this plea agreement will be automatically reinstated. In such event, defendant waives any objections, motions, or defenses based upon the Speedy Trial Act or the Sixth Amendment to the Constitution as to the delay occasioned by the later proceedings.

Disclosure of Information to U.S. Probation Office

The defendant understands the government's obligation to provide all information in its file regarding defendant to the United States Probation Office.

The defendant fully understands and agrees to cooperate fully with the United States Probation Office in providing:

1. All criminal history information, i.e., all criminal convictions as defined under the Sentencing Guidelines.

2. All financial information, e.g., present financial assets or liabilities that relate to the ability of the defendant to pay a fine or restitution.

3. All history of drug abuse which would warrant a treatment condition as part of sentencing.

4. All history of mental illness or conditions which would warrant a treatment condition as a part of sentencing.

Effect on Forfeiture Proceedings

Nothing in this agreement shall be construed to protect the defendant from civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Further, this agreement does not preclude the United States from instituting any civil proceedings as may be appropriate now or in the future.

WAIVER OF DEFENDANT'S RIGHTS AND FACTUAL BASIS

Waiver of Rights

I have read each of the provisions of the entire plea agreement with the assistance of counsel and understand its provisions. I have discussed the case and my constitutional and other rights with my attorney. I understand that by entering my plea of guilty I will be giving up my right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to resent evidence in my defense; to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination; all with the assistance of counsel, to be presumed innocent until proven guilty beyond a reasonable doubt, and to appeal.

I agree to enter my guilty plea as indicated above on the terms and conditions set forth in this

agreement.

I have been advised by my attorney of the nature of the charge to which I am entering my guilty plea. I have further been advised by my attorney of the nature and range of the possible sentence.

My guilty plea is not the result of force, threats, assurance or promises other than the promises contained in this agreement. I agree to the provisions of this agreement as a voluntary act on my part, rather than at the direction of or because of the recommendation of any other person, and I agree to be bound according to its provisions. I agree that any Guideline Range referred to herein or discussed with my attorney is not binding on the Court and is merely an estimate.

I agree that this written plea agreement contains all the terms and conditions of my plea and that promises made by anyone (including my attorney) that are not contained within this written plea agreement are without force and effect and are null and void.

I am satisfied that my defense attorney has represented me in a competent manner.

I am not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair my ability to fully understand the terms and conditions of this plea agreement.

Factual Basis

I further agree that the following facts accurately describe my conduct in connection with the offense to which I am pleading guilty and that if this matter were to proceed to trial the government could prove these facts beyond a reasonable doubt:

On February 13, 1998, in Sierra Vista, Arizona, I was approached by three law enforcement officers.

They attempted to detain me in order to conduct an interview. I refused to allow myself to be interviewed and attempted to leave the area in my vehicle. DEA agent David Horan attempted to physically prevent me from getting in my vehicle. In response, I knocked him backward with my left forearm. I then got into my vehicle and attempted to leave. Agent Horan reached inside my truck in an effort to turn off the engine. I struggled with the agent attempting to push him out of the truck. I then drove the truck in reverse at a high rate of speed directly toward another law enforcement officer (Sgt. Mark Dannels). I did not see the officer, but I concede that my conduct was reckless. In order to avoid being hit by my vehicle, Officer Dannels was forced to dive out of he way, landing in a cactus. At the time of this event, Sgt. Dannels was assisting federal law enforcement officers in the performance of their official duties.

_____

Date

_____

Danny Alan Mason
Defendant

DEFENSE ATTORNEY'S APPROVAL

I have discussed this case and the plea agreement with my client in detail and have advised the defendant of all matters within the scope of Fed. R. Crim. P. 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea, including the defendant's waiver of the right to appeal. No assurances, promises, or representations have been given to me or to the defendant by the

government or by any of its representatives which are not contained in this written agreement. I concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of my client, I agree to make a bona fide effort to ensure the guilty plea is entered in accordance with all the requirements of Fed. R. Crim. P. 11.

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Richard L. Lougee
Attorney for Defendant

GOVERNMENT'S APPROVAL

I have reviewed this matter and the plea agreement. I agree on behalf of the United States that the terms and conditions set forth are appropriate and are in the best interests of justice.

JOSÉ de JESUS RIVERA
United States Attorney
District of Arizona

_____

Date

_____

Sean C. Chapman
Assistant U.S. Attorney